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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-610

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
Petitioners,

vs.

RUSSELL E. TRAIN, ETC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioners, The City of Highland Park, Illinois, The Village of Deerfield, Illinois, Tri-Suburban Defense Council, Franklin Cole, Joan Cole, Lesley Kodner, Denise Kodner, James Frankel, Florence Frankel, Andrew Taft, Katherine Taft, Thomas Nathan, Louise Nathan, Ralph L. Brill, Judith Brill, Ludoslaw Tybur, Kay Tybur, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 24, 1975.

OPINIONS BELOW.

The modified opinion of the Court of Appeals for the Seventh Circuit entered July 24, 1975 (A10) is reported at 519 F. 2d 681 (7th Cir. 1975). The court's original opinion, entered

June 10, 1975 (A45), is unreported. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (A71), dismissing the action is reported at 374 F. Supp. 758 (N. D. Ill. 1974).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 10, 1975 (A43). A timely petition for rehearing and suggestion for en banc hearing was denied and the Court modified its previous opinion on July 24, 1975 (A39). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether § 304 of the Clean Air Act, 42 U. S. C. § 1857h-2, is the exclusive basis of district court subject matter jurisdiction to remedy the Environmental Protection Agency Administrator's failure to perform a statutorily mandated duty under the Clean Air Act, 42 U. S. C. § 1857 *et seq.*?

2. Whether the 60 day notice prerequisite for actions under § 304 is a bar to subject matter jurisdiction in actions brought under the general federal question statute (28 U. S. C. § 1331); the statute creating subject matter jurisdiction to compel an officer of the United States to perform his duty (28 U. S. C. § 1361); and the Administrative Procedure Act (5 U. S. C. §§ 701-706) where § 304(e) specifically preserves preexisting statutory and common law causes of action?

3. Whether the Administrator's failure to include statutorily mandated elements in his promulgation of a regulation under the Clean Air Act renders such failure reviewable in the district court (under either 42 U. S. C. § 1857h-2, 28 U. S. C. § 1331, 28 U. S. C. § 1361, 5 U. S. C. §§ 701-706) or in the Court of Appeals (under 42 U. S. C. § 1857h-5(b)(1)) or both?

STATUTES INVOLVED.

This case involves the jurisdictional grants for judicial review under the Clean Air Act of 1970—Section 304, 42 U. S. C. § 1857h-2 (A4) and Section 307, 42 U. S. C. § 1857h-5 (A7) —and subject matter jurisdiction under 28 U. S. C. § 1331 (A4), 28 U. S. C. § 1361 (A4) and the provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* (A1).

STATEMENT OF THE CASE.

The controversy presented to this Court involves the "jurisdictional badminton" played by the United States Environmental Protection Agency, the Circuit Courts of Appeal and the district courts in applying the jurisdictional grants created by the Clean Air Act, 42 U. S. C. § 1857 *et seq.* and the preexisting jurisdictional grants under 28 U. S. C. § 1331, 28 U. S. C. § 1361 and 5 U. S. C. §701 *et seq.* Instead of administering a system for judicial review designed to give swift and clear adjudication of substantive rights and obligations under the statute, the lower courts have become bogged down in a series of jurisdictional inconsistencies. These inconsistencies have hamstrung the Congressional desire to achieve air quality on an expeditious schedule and have left persons injured by EPA actions or failures to act asking the jurisdictional analog to the Abbott and Costello refrain—"Who's on first?"

Though there are a number of variations, the basic problem stems from promulgation of regulations by the Administrator in which the Administrator fails to include statutorily mandated components. Under § 307 of the Clean Air Act, 42 U. S. C. § 1857h-5(b)(1), judicial review of promulgated regulations is directly in the United States Court of Appeals for the "appropriate circuit". Under § 304 of the Clean Air Act, 42 U. S. C. § 1857h-2(a), the Administrator's failure to perform a nondiscretionary duty can be reviewed by an action against the Administrator in the district court.

Since a promulgation of regulations which fails to include statutorily mandated components necessarily involves both promulgation and failure to act, the courts have demonstrated a schizophrenic reaction to attempts to seek judicial review either in the district court or the court of appeals. Indeed, the Circuit Court of Appeals for the District of Columbia has suggested that the Administrator's failure to include statutorily required components in the regulations he promulgates may be reviewable either in the district court (§ 304) or the court of appeals (§ 307). See *Natural Resources Defense Council* v. *Environmental Protection Agency*, 512 F. 2d 1351, 1356-1357 (D. C. Cir. 1975). At least one other circuit has held that once a regulation is promulgated, all challenges, including failures to include certain components, should be heard by the appellate court. *Anaconda* v. *Ruckelshaus*, 482 F. 2d 1301, 1304 (10th Cir. 1973). The Seventh Circuit in the decision below held that despite the Administrator's promulgation of what purported to be regulations governing significant deterioration (39 Fed. Reg. 42510, December 5, 1974) and despite the Administrator's claim that the sole method of judicial review for deficiencies in those regulations was in the court of appeals, the exclusive avenue of review was in the district court. *City of Highland Park* v. *Train*, 519 F. 2d 681, 697 (7th Cir. 1975)[1] (A37).

This confusion over jurisdiction between district court and appellate court has been compounded by the inconsistent positions taken by the Administrator in jurisdictional disputes in Clean Air Act cases and almost identical jurisdictional disputes

1. Ironically, the district judge who first ordered the Administrator to promulgate significant deterioration regulations has held that the promulgation of even partial significant deterioration regulations vests jurisdiction exclusively in the court of appeals. Order of Judge John H. Pratt, November 15, 1974, in *Sierra Club* v. *Train*, ... F. Supp. ..... (D. D. C. C. A. No. 1031-72). It was Judge Pratt who originally entered the order requiring promulgation of significant deterioration regulations. *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972); *aff'd. per curiam* ..... F. 2d ....., 4 E. R. C. 1815 (D. C. Cir. 1972), *aff'd. by an equally divided Court sub nom. in Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

under the similar judicial review provisions of the Federal Water Pollution Control Act Amendments of 1972.[2] In some cases the Administrator has argued that omissions or failures to include statutorily required components in regulations should be brought in the district court[3] and in other cases the Administrator has argued that such omissions must be challenged exclusively in the appellate court.[4]

This "jurisdictional badminton"[5] game reached its zenith in the instant case. Petitioners brought suit in the district court against the Administrator and a group of shopping center developers seekings a mandatory injunction requiring the Administrator to promulgate "complex source" regulations and significant deterioration regulations relating to complex sources. "Complex" or "indirect source" are terms used to describe facilities which don't emit pollutants themselves but which attract significant vehicle congestion and thus cause significant vehicular pollution. The Administrator has repeatedly stated that such sources are significant health hazards and that preconstruction permit review is the only rational method of changing traffic design or location to avoid traffic congestion. Petitioners sought a preliminary injunction against the developers asking that construction be halted until the regulations had been applied to the proposed center. Promulgation of the regulations was long overdue under the statutory timetable mandated by the Clean Air Act.

Jurisdiction in the district court was predicated on 28 U. S. C. § 1331, 28 U. S. C. § 1361, § 304 of the Clean Air Act, and

2. § 505 (district court, 33 U. S. C. § 1365) and § 509 (appellate court 33 U. S. C. § 1369).

3. *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351, 1357 (D. C. Cir. 1975).

4. Brief of Federal appellees in the Seventh Circuit in the instant case, *City of Highland Park* v. *Train*, at p. 12: See also *Natural Resources Defense Council* v. *Train*, 519 F. 2d 287, 290 (D. C. Cir. 1975).

5. See the dissenting opinion of Judge Wright in *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351 at 1361 (D. C. Cir. 1975).

the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* Since construction of the shopping center was imminent and because preliminary injunctive relief was sought under Rule 65, Federal Rules of Civil Procedure, petitioners did not file a 60 day notice as required by § 304(b). Instead, they relied on the traditional bases for district court jurisdiction alleged in their complaint.

While the district court litigation was pending, the Administrator promulgated what purported to be "indirect source" regulations. 39 Fed. Reg. 7270 (February 25, 1974). However, he expressly excluded from the scope of his indirect source regulations the significant deterioration aspects of indirect source control.

> "Because several basic approaches are still being considered, an attempt to reflect non-deterioration considerations in the indirect source regulations would be premature. However it is EPA's intent that indirect source and significant deterioration regulations will be consistent with one another. *Specific relationships will be addressed in regulation to be promulgated on significant deterioration.*"
>
> 39 Fed. Reg. at 7271
> (emphasis added).

Despite a claim by the Administrator that § 304 was the exclusive basis of district court jurisdiction and that the action was therefore barred by failure to give 60 days notice, the district court held that the 60 day notice provision did not bar jurisdiction under 28 U. S. C. §§ 1331 and 1361. However, the district court ruled for the Administrator on the merits, concluding that the Administrator had complied with his statutory duty by promulgating the February 25, 1974 indirect source regulations.

As to the failure of the Administrator to include significant deterioration aspects of indirect source regulations, the district court concluded that the significant deterioration issue was dis-

cretionary with the Administrator.[6] He therefore dismissed the complaint for failure to state a claim.

Petitioners appealed and during the pendency of the appeal the Administrator promulgated what purported to be significant deterioration regulations. 39 Fed. Reg. 42510 (December 5, 1974). However, contrary to his earlier promise to include indirect source controls in his significant deterioration regulations, no mention was made concerning indirect sources. Yet the Administrator's brief in the Seventh Circuit below argued that the December 5, 1974 regulations had complied fully with the court's order in *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D. D. C. 1972), *aff'd. per curiam*, 4 E. R. C. 1815 (D. C. Cir. 1972); *aff'd. by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U. S. 541 (1973). The Administrator contended that any dissatisfaction with those regulations should be reviewed exclusively in the court of appeals under § 307.

Petitioners attempted to preserve the merits of their claim from these jurisdictional anomalies by maintaining both the district court appeal[7] and by filing a timely petition for review directly in the court of appeals under § 307.[8] On petitioners' motion, the two proceedings were consolidated.

In direct contrast to the district court below the Seventh Circuit held that the Administrator had not complied with the mandate of the *Sierra Club* decision but that the petitioners

6. "Moreover, it has not been conclusively determined that the Clean Air Act requires the prevention of significant deterioration as a decision by an equally divided Supreme Court is not an authoritative determination for other cases." 374 F. Supp. 758 at 774 (A97), referring to this Court's action in *Fri* v. *Sierra Club*, 412 U. S. 541 (1973).

7. In the Seventh Circuit, the district court appeal was designated No. 74-1271.

8 In the Seventh Circuit, the petition for review of the Administrator's failure to include significant deterioration controls for carbon monoxide, hydrocarbons, oxides of nitrogen and photochemical oxidants—the vehicular pollutants associated with indirect sources—in his promulgation on December 5, 1974, 39 Fed. Reg. 42510, was designated No. 75-1006.

had failed to meet the jurisdictional prerequisites to raise the substantive issue. The court of appeals held that the Administrator's failure to include statutorily mandated components in the promulgated regulations should be reviewed exclusively in the district court. Moreover, the Seventh Circuit held that the exclusive basis for district court subject matter jurisdiction was § 304(a)(2). It held that district court jurisdictional bases which would have existed apart from § 304—28 U. S. C. § 1331, 28 U. S. C. § 1361 and the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*—had been barred by the enactment of § 304. The Seventh Circuit's decision that § 304 was the exclusive basis of district court subject matter jurisdiction was made despite the express savings provision of § 304(e), 42 U. S. C. § 1857h-2(e) which states:

> "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator of a State agency)."

Since the Seventh Circuit held that § 304 is the exclusive basis of district court jurisdiction and since petitioners had not given the sixty day notice required by § 304(b)(1)(A) as a prerequisite to an action under § 304, the court of appeals held that there was no subject matter jurisdiction in the district court.

Moreover, despite a petition for rehearing which cited both the directly contrary opinion of the District of Columbia Circuit in *Natural Resources Defense Council* v. *Train*, 510 F. 2d 692, 698-703 (D. C. Cir. 1975)[9] and the decision of this Court in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967) and *Rusk* v. *Cort*, 369 U. S. 367 (1962), the Seventh Circuit declined to change its decision. It simply filed a modified opinion acknowledging the conflict between the Seventh Circuit and the District of Columbia Circuit.

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9. See also *Natural Resources Defense Council* v. *Train*, 519 F. 2d 287, 291 (D. C. Cir. 1975); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 664 n. 16 (D. C. Cir. 1975).

The Seventh Circuit's decision on the exclusivity of § 304 as a basis of district court jurisdiction raises a three-pronged dilemma in cases where the Administrator fails to include certain components in promulgating regulations:

1. Requirement of a 60 day notice prior to commencing an action effectively precludes a person suffering injury as a result of the Administrator's failure to act from seeking temporary or preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. As explained in *N. R. D. C.* v. *Train*, 510 F. 2d 692, 700 (D. C. Cir. 1975) the purpose of § 304 was to *expand* jurisdiction to those lacking the requisite injury for standing and jurisdictional amount. It was not designed to bar emergency relief for those actually suffering injury who would have had the requisite standing to seek relief under other jurisdictional grants.

2. Exclusivity of § 304 jurisdiction would render unreviewable those failures to act which are not a violation of a clear duty but are an abuse of discretion normally reviewable under 5 U. S. C. § 706(2)(A). Cf. *N. R. D. C.* v. *Train*, 519 F. 2d 287, 291 (D. C. Cir. 1975). Both the district court and the court of appeals below questioned whether the duty to promulgate significant deterioration regulations was non-discretionary or actually within the discretion of the Administrator.[10] If the duty to promulgate is discretionary then § 304 jurisdiction does not exist and review of the Administrator's failure to promulgate such regulations is in a "jurisdictional limbo" *N. R. D. C.* v. *Train*, 519 F. 2d 287 at 291.

3. Congress clearly intended § 304 to expand the jurisdiction of district courts to persons who would otherwise not have the requisite standing to sue. Congress wanted uninjured citizens to act as "private attorneys general" to aid in the enforcement of the Clean Air Act.[11] As a limitation on this new expansion

10. *City of Highland Park* v. *Train*, 519 F. 2d at 692 (A27); district court opinion 374 F. Supp. at 774 (A97).

11. Compare the lack of a standing requirement under § 304 with the required standing to seek appellate review under § 307,

of jurisdiction to non-injured private attorneys general, Congress imposed a 60 day notice provision. However, Congress expressly stated that § 304 was not intended to affect or restrict the jurisdiction and remedies which existed under other statutes and at common law. But the Court of Appeal's decision below destroys those traditional statutory bases of judicial relief for persons suffering actual injury.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts with Decisions of the Supreme Court as to the Exclusivity of a Statutory Jurisdictional Grant and the Preclusion of Traditional Bases of Subject Matter Jurisdiction.

The district court action below was brought under four separate bases of subject matter jurisdiction:

a. 28 U. S. C. § 1331—general federal questions
b. 28 U. S. C. § 1361—action to compel a federal officer to perform a duty owed to plaintiff
c. 5 U. S. C. § 701 *et seq.*—the Administrative Procedure Act
d. 42 U. S. C. § 1857h-2—citizen suits under the Clean Air Act

The Seventh Circuit held that § 1857h-2 is the exclusive jurisdictional basis for district court claims against the Administrator. Since petitioners, in seeking preliminary injunctive relief, had not filed the 60 day notice required by § 1857h-2(b)(1)(A), the Seventh Circuit held that no suit could be commenced even though the action was also brought under jurisdictional grants provided by other statutes.

Unfortunately the Seventh Circuit completely ignored the existence of the explicit statutory language which preserves other

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Natural Resources Defense Council v. *E. P. A.*, 481 F. 2d 116, 119-120 (10th Cir. 1973).

statutory and common law remedies wholly independent of § 304.

Section 304(e) expressly provides:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."
>
> 42 U. S. C. § 1857h-2(e) (A6).

The explicit congressional intent set forth in § 1857h-2(e) not to restrict traditional remedies is echoed throughout the legislative history of the Clean Air Act. For example, the House-Senate Conference Committee stated:

> "The right of persons or classes of persons to seek enforcement or relief under any other statute or common law remedy is not affected."[12]

The Senate Public Works Committee expressed similar intent:

> "It should be noted however that the section [1857h-2] would preserve any rights or remedies under any other law."[13]

The 60 day notice requirement was intended only as a limitation to the special actions under § 1857h-2 and was not intended to restrict jurisdiction over actions that could exist independent of § 1857h-2. See: *Natural Resources Defense Council* v. *Train*, 510 F. 2d 692, 698-703 (D. C. Cir. 1975).[14] Indeed, the pur-

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12. See: A Legislative History of the Clean Air Act Amendments of 1970, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (1974) p. 206.

13. *Id.* at 438.

14. This decision by the Court of Appeals for the District of Columbia contains an extended analysis of the legislative history of § 1857h-2 and its analog under the Federal Water Pollution Control Act, 33 U. S. C. § 1365(b)(2). See: pp. 698-702. The holding of that case is directly contrary to the Seventh Circuit's decision for which petitioners seek certiorari.

pose of § 1857h-2 was to expand federal subject matter jurisdiction by removing obstacles of jurisdictional amount and standing which barred actions by citizens not suffering "injury in fact". This special citizen suits provision was definitely not intended to limit those actions where traditional jurisdictional amount and standing requirements had been met.[15] See: *N. R. D. C.* v. *Train, supra,* 510 F. 2d at 700.

The clear statutory language of the savings clause, § 1857h-2(e), and the multiple expressions of legislative intent not to restrict independent remedies becomes even more significant when viewed in light of this Court's decisions analyzing government claims of exclusivity of review under specialized statutes. The leading decision is *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967).

In *Abbott,* a group of drug manufacturers brought suit in district court challenging a labeling regulation promulgated by

15. That subject matter jurisdiction exists under other statutes to review the Administrator's failure to act is clear. Where the district court must examine the federal substantive law upon which a claim for relief is founded, the district court has subject matter jurisdiction under 28 U. S. C. § 1331, general federal question jurisdiction. *The Fair* v. *Kohler Die Company,* 228 U. S. 22, 25 (1913); *Bell* v. *Hood,* 327 U. S. 678, 682 (1946); *Wheeldin* v. *Wheeler,* 373 U. S. 647, 649 (1963); *Montana-Dakota Co.* v. *Pub. Serv. Co.,* 341 U. S. 246, 249 (1951); *Powell* v. *McCormack,* 395 U. S. 486, 516 (1969); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 409 F. 2d 718, 719-720 (2nd Cir. 1969), *rev'd. on merits,* 403 U. S. 388 (971). The complaint alleges and no one has disputed that the amount in controversy exceeds $10,000. See: *St. Paul Mercury Indem. Co.* v. *Red Cab Co.,* 303 U. S. 283 (1938).

While not essential to subject matter jurisdiction (given jurisdiction under § 1331), this Court has indicated and the Circuit Courts of Appeals have increasingly held, that the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* provides an independent basis of subject matter jurisdiction. See: *Pickus* v. *United States Board of Parole,* 507 F. 2d 1107, 1109 (D. C. Cir. 1974) and cases cited therein. There is no need to engage in extended discussion on the Seventh Circuit's narrow construction of 28 U. S. C. § 1361 jurisdiction other than to note that the rigid mandamus construction of § 1361 is contrary to the broad remedial purpose of the statute. See: *Peoples* v. *United States Department of Agriculture,* 427 F. 2d 561 (D. C. Cir. 1970).

the Commissioner of the Food and Drug Administration. The district court dismissed the complaint on the ground that 21 U. S. C. §§ 371(e) and (f), which provided for review of certain kinds of regulations in the Court of Appeals, was the exclusive review mechanism. This Court reversed, stating:

> "Judicial review of a final agency action will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."
>
> 387 U. S. at 140.

This Court found no evidence at all that Congress intended to preclude traditional avenues of judicial review. Indeed, in an analysis particularly appropriate to the instant case, this Court emphasized the existence of a savings clause provision in the review statutes which, like § 1857h-2(e), preserved existing remedies. 387 U. S. at 144. The Court found the savings clause to be affirmative evidence of congressional intent to preserve remedies such as those existing under the Administrative Procedure Act:

> "We prefer to take the savings clause at face value and to read it in harmony with the policy favoring judicial review expressed in the Administrative Procedure Act and this Court's decisions."
>
> 387 U. S. at 146.

See also: *Rusk* v. *Cort*, 369 U. S. 367 (1962). In *Rusk*, a physician who had left the United States and had refused to submit to induction into the military, applied for a passport to return to this country. The State Department denied the passport on the ground that Cort had lost his citizenship. Cort then sued the Secretary of State in the district court under the Administrative Procedure Act. The district court denied the government's motion to dismiss which argued that a statutory habeas corpus proceeding pursuant to 8 U. S. C. § 360(c) was the only method for reviewing determinations of citizenship. Upon the district court's holding of jurisdiction under the Administrative Procedure Act and its ruling in favor of the plaintiff on

the merits, the government appealed. This Court affirmed, stating:

> "[T]he Court will not hold the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions . . . in the absence of clear and convincing evidence that Congress so intended."
>
> 369 U. S. at 380.

Applying the mandates of *Abbott Laboratories* v. *Gardner* and *Rusk* v. *Cort* to the instant case, it is clear that there is no evidence of congressional intent to preclude traditional forms of judicial review by imposing a 60 day notice requirement on such remedies. Indeed, § 1857h-2(e) and its legislative history demonstrates affirmative evidence that Congress wished to preserve traditional avenues of review independent of any such restraints.

The direct conflict between the Seventh Circuit's decision below and the decisions of the this Court in *Abbott Laboratories* v. *Gardner, supra* and *Rusk* v. *Cort, supra* justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Exclusivity of 42 U. S. C. § 1857h-2 as a Basis of District Court Subject Matter Jurisdiction.

As noted above the District of Columbia Circuit has held that the citizen suit jurisdictional grant of the Clean Air Act, 42 U. S. C. § 1857h-2, and its jurisdictional counterpart in the Federal Water Pollution Control Act, 33 U. S. C. § 1365 are not the exclusive bases for district court subject matter jurisdiction and that 28 U. S. C. § 1331, 28 U. S. C. § 1361 and the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.* also conferred subject matter jurisdiction on the district court. *N. R. D. C.* v. *Train,* 510 F. 2d 692, 698-703.[16] This holding

16. See also *N. R. D. C.* v. *Train,* 519 F. 2d 287, 291 (D. C. Cir. 1975); *Oljato Chapter of Navajo Tribe* v. *Train,* 515 F. 2d 654, 664 n. 16 (D. C. Cir. 1975).

was based on an extensive analysis of the legislative history and purpose of § 304 as well as adherence to the savings clause provisions of § 304(e). The decision of the Seventh Circuit below is directly contrary to the holdings of the District of Columbia Circuit.

An additional related conflict with the District of Columbia Circuit arises from the Seventh Circuit's characterization of the Administrator's significant deterioration obligation as potentially discretionary (A27). If so, review of that obligation would not even be available under § 304—which is limited to non-discretionary duties—but would be reviewable as an abuse of discretion under the Administrative Procedure Act, 5 U. S. C. § 706. *N. R. D. C.* v. *Train,* 519 F. 2d 287, 291 (D. C. Cir. 1975).

These conflicts justify the grant of certiorari to review the judgment below.

3. The Decision Below Conflicts with the Decision of Other Courts of Appeals as to the Appropriate Forum—District Court or Court of Appeals—to Seek Review of the Administrator's Failure to Include Statutorily Mandated Components in Promulgation of Regulations.

The Administrator promulgated what purported to be significant deterioration regulations on December 5, 1974, 39 Fed. Reg. 42510. He claimed that this promulgation satisfied the court order in *Sierra Club* v. *Ruckelshaus, supra.* To protect their jurisdictional base, petitioners—already on appeal of the district court action in Docket No. 74-1271—filed a timely petition for review directly in the Seventh Circuit Court of Appeals under § 307—Docket No. 75-1006.

The Seventh Circuit found—and counsel for the Administrator admitted at oral argument—that the December 5, 1974 regulations did not include statutorily mandated components.[17]

17. Controls for vehicular pollutants—carbon monoxide, hydrocarbons, etc.

The Seventh Circuit held that the Administrator's failure to include the components was reviewable only in the district court and not in the court of appeals under § 307.

The Tenth Circuit has taken a directly contrary view and held that the Administrator's promulgation of regulations and the components of those regulations are only reviewable in the courts of appeals pursuant to § 307. *Anaconda* v. *Ruckelshaus*, 482 F. 2d 1301, 1304-1305 (10 Cir. 1973).

The District of Columbia Circuit has taken a different approach. It has recognized the semantic confusion which necessarily results from characterizing an inadequate or incomplete action as an action or a failure to act. Thus, where the Administrator has promulgated a regulation which in the opinion of the challengers does not go far enough, jurisdiction could rest either in the district court or the court of appeals. *N. R. D. C.* v. *E. P. A.*, 512 F. 2d 1351, 1356-1357 (D. C. Cir. 1975).

These conflicts justify the grant of certiorari to review the judgment below.

4. The Decision Below Creates Significant Problems Regarding the Subject Matter Jurisdiction of the Federal Courts and the Administration of Judicial Review Under the Clean Air Act.

As discussed above, a statutory scheme which was intended to give expeditious review of substantive issues under the Clean Air Act has become bogged down in broad jurisdictional inconsistencies between the circuits. If the appellate court is the appropriate forum for judicial correction of statutorily deficient regulations, then the decision below is clearly erroneous and will lead to further confusion of the review structure.

If, conversely, the district court is the appropriate forum, the Seventh Circuit's radical constriction of district court jurisdiction flies in the face of express Congressional intent, this

Court's decisions in *Abbott Laboratories* v. *Gardner, supra* and *Rusk* v. *Cort, supra* and the decisions of the District of Columbia Circuit in *N. R. D. C.* v. *Train,* 510 F. 2d 692 (D. C. Cir. 1975).

If allowed to stand, the decision below will greatly expand the ever growing litigation over the jurisdiction of our court system at great cost to effective judicial administration.

CONCLUSION.

For the above reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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October, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No.

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
Petitioners,

vs.

RUSSELL E. TRAIN, ETC., ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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APPENDIX

UNITED STATES CODE, TITLE 5

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by susbtantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES CODE, TITLE 28

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

UNITED STATES CODE, TITLE 42

§ 1857h—2. Citizen suits—Establishment of right to bring suit

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency

to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Notice

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting

a violation of section 1857c—7(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 1857c—8(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; intervention by Administrator

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Award of costs; security

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this chapter (including a requirement applicable by reasons of sections 1857f of this title) or under an applicable implementation plan.

§ 1857h—5. Administrative proceedings and judicial review

(a)(1) In connection with any determination under section 1857c—5(f) of this title or section 1857f—1(b)(5) of this title, or for purposes of obtaining information under section 1857f—1(b)(4) or 1857f—6c(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of sections 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 1857f—1(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United

States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1(b)(1) of this title), any determination under section 1857f—1(b)(5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title, or his action under section 1857c—10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the

record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 74-1271

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,

Plaintiffs-Appellants,

vs.

RUSSELL E. TRAIN, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 73 C 3027
Bernard M. Decker, *Judge.*

No. 75-1006

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,

Petitioners,

vs.

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition for Review of an Order of the Environmental Protection Agency

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Argued February 21, 1975 — Decided June 10, 1975
Opinion Modified, July 24, 1975

Before CUMMINGS, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* In the principal case before us in these consolidated proceedings, No. 74-1271, plaintiffs sue to block the construction of a shopping center and the extension and

widening of the road along which the shopping center is to be built, relying upon the Clean Air Amendments of 1970, the National Environmental Protection Act, and the Equal Protection Clause of the Fourteenth Amendment. They seek to compel the Administrator of the Environmental Protection Agency to promulgate "indirect source" and "significant deterioration" regulations which they hope would preclude the construction of the shopping center and the road expansion (Counts I and II) and to enjoin the road expansion until the Department of Transportation has filed an environmental impact statement pursuant to the National Environmental Protection Act (Count III). Plaintiffs also allege that the Village of Northbrook has denied them equal protection by the adoption of a zoning ordinance which permits the construction of the shopping center (Count IV).

The District Court dismissed the claims under the Clean Air Amendments for failure to comply with the 60-day notice requirement of section 304, 42 U.S.C. § 1857h-2, for failure to state a claim on which relief can be granted, and on the ground that some of the relief requested was already the subject of orders issued by other federal courts. Finding it undisputed that there was no federal involvement in the road expansion project, the court granted summary judgment on the claim that an environmental impact statement should have been filed. The equal protection claim was also held to be without merit. The court entered an order dismissing the action, *City of Highland Park* v. *Train*, 374 F.Supp. 758 (N.D. Ill. 1974), from which plaintiffs appeal and which we affirm.

Plaintiffs are two municipalities adjacent to the site of the proposed shopping center, a non-profit corporation dedicated to protecting the environment in the area, and various individuals who reside near the site. The defendants are the Administrator of the Environmental Protection Agency, the agency itself, the Secretary of the Department of Transportation, the department itself, the Department of Highways of Cook County, Illinois,

the developers of the shopping center, proposed tenants of the shopping center, the Village of Northbrook, in which the shopping center will be located, and the trustees of the village.

The right of way of Lake-Cook Road extends from Lake Michigan along the entire boundary between Lake and Cook Counties to the western end of the boundary and continues on west to the Fox River. Between Milwaukee Avenue and Rand Road, the road is not completed. Where it is completed, it is, for the most part, two lanes wide. In 1967 the Cook County Highway Department initiated plans to expand the completed portions of the road to four lanes and to construct a four-lane extension on the right-of-way where no actual roadway presently exists.

In January, 1973, certain of the defendants announced a plan for the construction of a shopping center on the south side of Lake-Cook Road between Skokie Highway and Waukegan Road. The shopping center, according to the complaint, will occupy one million square feet, have a parking lot accommodating 5,000 cars, and generate 28,400 vehicle trips per day. Ninety percent or more of this traffic will be carried by Lake-Cook Road, the only through-street which provides access to the shopping center. Plaintiffs allege that this traffic "will overwhelm even the proposed four lane expanded roadway," and cause "intolerable" congestion at the intersections of Lake-Cook Road and Skokie Highway and Waukegan Road. As a result, residents of the area will be subjected to substantial "noise and discomfort in the use of their homes and in the use of the streets in their community" and will be exposed to increases in the concentration of carbon monoxide in the ambient air by more than 66 percent over existing levels.

The Clean Air Amendments and Their Implementation

To explain plaintiffs' claims under the Clean Air Amendments of 1970, it is necessary to begin by summarizing pertinent parts of that legislation and its implementation by actions of the Administrator and the states and by certain court decisions. The background and a more complete history of the amendments and their implementation to date appear in Mr. Justice Rehnquist's opinion for the Supreme Court in *Train* v. *Natural Resources Defense Council, Inc.*, 43 U.S.L.W. 4467 (U.S. April 16, 1975).

When the states did not act to fulfill their "primary responsibility" for prevention of air pollution under earlier federal clean air legislation, "Congress reacted by taking a stick to the states in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year." *Train* v. *Natural Resources Defense Council, Inc., supra,* 43 U.S.L.W. at 4468. The 1970 Amendments established a program to control air pollution to be carried out by the federal government and the states. The parts of the Amendments pertinent here may be summarized as follows:

The Administrator was required, before specified dates, to publish a list of air pollutants and issue "air quality criteria" containing information about each listed pollutant and its effects on the air. (Section 108, 42 U.S.C. § 1857c—3.) He was also required to establish national "ambient air quality standards" for each air pollutant for which air quality criteria were issued. (Section 109, 42 U.S.C. § 1857c—4.) The states have primary authority to establish "implementation plans" to achieve these standards, but these plans are subject to review by the Administrator. (Section 110, 42 U.S.C. § 1857c—5.)

Two sets of standards were to be prescribed by the Administrator, "primary standards," the "attainment and maintenance of which, in the judgment of the Administrator, based on [air

quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health;" and "secondary standards," which "shall specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." (Section 109(b), 42 U.S.C. § 1857c—4(b).) The Administrator prescribed these standards within the time allowed him by the Act.

Within nine months after the Administrator's promulgation of the national standards, each state was to submit to him a plan providing for the "implementation, maintenance, and enforcement" of the standards. (Section 110(a)(1), 42 U.S.C. § 1857c—5(a)(1).) Each state plan was required to provide for the attainment of the national primary standards "as expeditiously as practicable" and not later than three years after the date the Administrator approved the plan. (Section 110(a)(2)(A)(i), 42 U.S.C. §1857c—5(a)(2)(A)(i).) The national secondary standards were to be met within a "reasonable time" to be specified in the plan. (Section 110(a)(2)(A)(ii), 42 U.S.C. § 1857c—5(a)(2)(A)(ii).) Each state plan was to include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." Section 110(a)(2)(B), 42 U.S.C. § 1857c—5(a)(2)(B).) Other prerequisites to approval by the Administrator are set forth in the Act. (Section 110(a)(2)(C) through (H), 42 U.S.C. § 1857c—5(a)(2)(C) through (H).)

Within four months after the date a state plan was required to be submitted, the Administrator was required to review the plan to determine whether it satisfied the statutory requirements and to approve or disapprove the plan or each portion thereof. (Section 110(a), 42 U.S.C. § 1857c—5(a).) If the Admin-

istrator determined that a state's plan or any portion thereof did not satisfy the statutory requirements, he was to disapprove the plan, or the offending portion thereof, and, within six months after the date the plan was required to be submitted, promulgate his own implementation plan or portion thereof for that state. (Section 110(c)(1), 42 U.S.C. § 1857c—5(c)(1).)

Significant Deterioration Regulations

During the period he was reviewing state plans, the Administrator questioned his authority to require those plans to protect against "significant deterioration" of air quality in areas in which the air was cleaner than required by the national standards, when that significant deterioration would not result in pollution violative of the national standards. He took the position that he would not demand such provisions in state plans. See *Sierra Club* v. *Ruckelshaus,* 344 F.Supp. 253, 254 (D.D.C. 1972), *aff'd per curiam,* 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom. Fri* v. *Sierra Club,* 412 U.S. 541 (1973). In the *Sierra Club* case the court held, on motion for preliminary injunction, that the Administrator had a non-discretionary duty to protect the air quality from significant deterioration and issued a preliminary injunction prohibiting him from approving state plans "which allow pollution levels of clean air to rise to the secondary standard level of pollution." 344 F.Supp. at 256.[1] The court ordered the Administrator to promulgate proposed significant deterioration regulations within six months as to any state plan which permitted or failed to take measures sufficient to prevent significant deterioration. 2 E.L.R. 20262, 20263.

As a result of that decision the Administrator again reviewed all state implementation plans and disapproved them to the extent that they failed to prevent significant deterioration of air quality. (40 C.F.R. § 52.21 (1974), 37 Fed. Reg. 23,836

1. See also *Natural Resources Defense Council, Inc.* v. *Train,* 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, supra,* 43 U.S.L.W. 4467; *Exxon Corp.* v. *City of New York,* 372 F.Supp. 335, 339 (S.D.N.Y. 1974).

(Nov. 9, 1972).) One of the plans affected was that of Illinois, which had been submitted to the Administrator on January 31, 1972, and given partial approval on May 26, 1972. (40 C.F.R. § 52.722 (1974), 37 Fed. Reg. 10,842 (May 31, 1972).) In response to his duty under the court's order in the *Sierra Club* case the Administrator proposed (38 Fed. Reg. 18,986 (July 16, 1973)) and reproposed (39 Fed. Reg. 31,000 (Aug. 27, 1974)) rules on the prevention of significant air quality deterioration. Eventually he promulgated regulations for two of the six air pollutants for which he had earlier promulgated national ambient air quality standards under his statutory duty.[2] (39 Fed. Reg. 42,510 (Dec. 5, 1974).) These regulations are intended to prevent significant deterioration in the quality of air for two pollutants, particulate matter and sulfur dioxide, by limiting increases in the concentrations of those pollutants in areas where the present level of pollution is less than required by the national ambient air quality standards. This is to be accomplished by dividing those areas in which the level of pollution does not presently exceed the national ambient air quality standards into three classes in which increases in concentration of the two pollutants are limited by different amounts. The Administrator originally classified all areas, but the states, after a public hearing and subject to other requirements, may submit to the Administrator proposals for reclassification of areas. No final regulations have been promulgated for the other four pollutants as of yet. The Administrator, therefore, has not yet complied with the *Sierra Club* order.

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2. The six pollutants originally identified were sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. (40 C.F.R. §§ 50.4—50.11 (1974).) The original proposed rules referred to in the text broadened "nitrogen dioxide" to "nitrogen oxide" and omitted photochemical oxidants, apparently because they are formed from hydrocarbons and nitrogen dioxides and do not exist otherwise, and therefore do not require separate treatment. This part of the proposed rules required only that the best possible technology be used.

Indirect Source Regulations

When the Administrator gave partial approval to the Illinois implementation plan on May 26, 1972, he also granted to Illinois, as he did to a number of other states, extensions until February 15, 1973, to submit the transportation portion of its implementation plan. Several other states were given until mid-1977 to attain the national primary standards. (37 Fed. Reg. 10,842 (May 31, 1972).) The Court of Appeals for the District of Columbia, on a petition for review, held that this extension was not authorized by the Act, and also found that the record did not show whether the Administrator had conducted a state-by-state determination on the efficacy of the state plans to provide for the maintenance of the primary and secondary standards beyond May 31, 1975. *National Resources Defense Council, Inc.* v. *EPA*, 475 F.2d 968, 970, 971-972 (D.C. Cir. 1973). The court established a new time schedule under which the Administrator was to review the maintenance provisions of the state plans and disapprove those which he determined did not contain sufficient measures for maintenance of the primary standard. (*Id.* at 972.) In this re-examination, the Administrator found that none of the state plans, including that of Illinois, contained adequate provisions for insuring the maintenance of national standards, but granted the states another opportunity to develop adequate programs. (40 C.F.R. § 52.22(a) (1974), 38 Fed. Reg. 6280 (March 8, 1973).)

The Administrator, pursuant to the order of the Court of Appeals for the District of Columbia in *Natural Resources Defense Council, Inc.* v. *EPA*, then promulgated regulations to insure the maintenance of national standards by requiring state implementation plans to contain procedures for review of any new stationary source or modification that might "interfere with attainment or maintenance of a standard either directly because of emissions from it, or indirectly, because of emissions resulting from mobile source activities associated with it." (40 C.F.R. § 51.18 (1974), 38 Fed. Reg. 15,834, 15,836 (June 18, 1973).) He suggested guidelines to assist the states in com-

plying with the requirements of section 51.18. (See Appendix O to 40 C.F.R. § 51.18.)

The Administrator was also required by *National Resources Defense Council, Inc.* v. *EPA*, to promulgate indirect source review regulations if states either failed to submit such regulations on their own or submitted inadequate regulations. (475 F.2d at 971.) In response to that requirement the Administrator proposed regulations (38 Fed. Reg. 29,893 (Oct. 30, 1973)), and, after public hearings in 43 states, promulgated them. (40 C.F.R. § 52.22 (1974), 39 Fed. Reg. 7270 (Feb. 25, 1974).) He also determined that since the plans of most states, including Illinois, contained inadequate provisions for review of indirect sources as required by section 51.18, the provisions of section 52.22(b) would be incorporated by reference and made a part of each of those plans. (See, *e.g.*, 40 C.F.R. § 52.736 (1974).)

An indirect source is defined by the regulation as "a facility, building, structure, or installation which attracts or may attract mobile source activities that results in emissions or a pollutant for which there is a national standard," for example a "[p]arking facility." (40 C.F.R. § 52.22(b)(i) (1974).) The regulation applies to any indirect source on which construction or modification is to commence after December 31, 1974. The Administrator later amended the indirect source regulations in respects not material here. (39 Fed. Reg. 25,292 (July 9, 1974).)

The Motion to Dismiss the Appeal

A motion by the defendants who are the developers of the shopping center to dismiss the appeal in No. 74-1271 against them and a prospective tenant was taken under advisement with the case. These defendants argue that a 1974 amendment to the Clean Air Act (42 U.S.C. §§ 1857c-5(c)(2)(C), (D)) and the promulgation of indirect source regulations moot Count I, the only part of the case concerning them, and that no case or controversy between them and the plaintiffs is raised in the plaintiffs' briefs because of failure to comply with Rule 28(a)

(5), Fed. R. App. P., which requires a short statement of the relief sought. The mootness ground is without merit, because plaintiffs seek in Count I not only promulgation of indirect source regulations, but also an injunction against construction of the shopping center until proper regulations have been promulgated. Since the developer defendants and the tenant defendants were necessary parties in a claim seeking such an injunction, the case is not moot as to them. The failure to state the relief sought against these defendants is not a basis for dismissal of the appeal as to them in the circumstances of this case. We therefore deny the motion to dismiss and turn to the merits of the appeal.

Counts I and II: The Regulations

In Count I of their complaint plaintiffs allege that the Administrator has been in violation of the provisions of the Act requiring him to issue two kinds of regulations: (a) significant deterioration regulations, preventing the significant deterioration of air quality in areas with air cleaner than national standards (as stated above, such regulations as to two of the six pollutants in question have now been promulgated); and (b) indirect source regulations, preventing violations of the national air quality standards by indirect sources (as stated above, these regulations have now been promulgated). They seek an order requiring him to promulgate those regulations and to halt further construction of the shopping center until its plans have been reviewed by the Administrator under both sets of regulations he is required to promulgate. In Count II the plaintiffs reallege that the Administrator has been in violation of his statutory duty to promulgate significant deterioration and indirect source regulations. In this count, however, they seek to halt construction of the Lake-Cook Road expansion and improvement project until its plans have been reviewed by the Administrator under both sets of regulations. To facilitate understanding of our analysis, we will divide our discussion of plaintiffs' claims by considering separately plaintiffs' rights to

obtain promulgation of the two sets of regulations rather than by considering separately Counts I and II of their complaint.

Review of the Indirect Source Regulations

The Administrator having promulgated indirect source regulations after the complaint was filed, plaintiffs' grievance now is that those regulations exempt indirect sources on which construction was commenced before January 1, 1975, as it was on the shopping center involved in this case.

Section 307(b)(1) of the Amendments, 42 U.S.C. § 1857h-5(b)(1), provides in pertinent part:

> "A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 1857c—5 of this title [section 110 of the Amendments] . . . may be filed only in the United States Court of Appeals for the appropriate circuit."

The indirect source regulations are subject to this section. Entitled "Review of Indirect Sources" (39 Fed. Reg. 7270-7285 (Feb. 25, 1974)), they purport to be promulgated pursuant to section 110, 42 U.S.C. § 1857c—5. It is so stated in the Administrator's comments in the first part of the regulations. Furthermore, the regulations contain the subtitle, "Approval and Promulgation of Implementation Plans," which is the statutory language used in section 307. The regulations set out the national standards for regulation of indirect sources, disapprove various parts of state implementation plans, and incorporate the federal standards into those plans. For example, Subpart O deals with Illinois and provides:

> "Subpart O—Illinois
>
> "25. Subpart O is amended by adding § 52.736 as follows:
>
> "§ 52.736 Review of new sources and modifications.
>
> "(a) The requirements of § 51.18 of this chapter are not met because the State failed to submit a plan for review of new or modified indirect sources.

> "(b) *Regulation for review of new or modified indirect sources.* The provisions of § 52.22(b) of this chapter are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Illinois." 39 Fed. Reg. at 7281.

Since the regulations incorporate the federal standards into the state plans, the Administrator is in effect promulgating implementation plans where state plans are deficient, in accordance with section 110(c) (42 U.S.C. § 1857c—5), which is to be reviewed only under section 307(b)(1) (42 U.S.C. § 1957h—5(b)(1)).

Other courts of appeals have held under analogous circumstances that a petition for review under section 307(b)(1) is the exclusive method of review. In *Getty Oil Co.* v. *Ruckelshaus,* 467 F.2d 349, 355-356 (3d Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), the court refused to permit, in an action filed in the district court, what amounted to an attack on the compliance date in regulation in the Delaware plan limiting the amount of sulfur content in burning fuel, holding that the sole remedy was a petition for review to the court of appeals under section 307(b)(1). Also supporting the rule that a petition under that section is the sole remedy for reviewing the promulgation or implementation of clean air plans and regulations are *Plan for Arcadia, Inc.* v. *Anita Associates,* 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied,* ..... U.S. ....., 95 S.Ct. 517 (1974); and *Anaconda Co.* v. *Ruckelshaus,* 482 F.2d 1301, 1304 (10th Cir. 1973). One district court decision is squarely in point, *Pinkney* v. *Ohio Environmental Protection Agency,* 375 F.Supp. 305, 309 (N.D. Ohio 1974), in which the alternative ground for dismissal of a challenge to the 180-day delay in the effective date of the indirect source regulations was that the exclusive remedy was a petition for review under section 307(b)(1). Similarly, in *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.,* 367 F.Supp. 1040, 1046 (D. Del. 1973), the court refused, on the same ground, to entertain an action to challenge a state-granted variance from compliance

with a sulfur dioxide emission regulation, which the Administrator had treated as a deferral of compliance amounting to a revision of the state implementation plan and approved as such. See *West Penn Power Co.* v. *Train*, 378 F.Supp. 941, 944-945 (W.D. Pa. 1974); *cf.* Luneburg and Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. Ind. & Com. L. Rev. 667, 691 n. 145 (1974).

Plaintiffs attempt to characterize the regulations' exemption of any facility on which construction was started before January 1, 1975 as a failure to promulgate regulations with respect to such facilities. We think, however, that a provision defining the scope of regulations and their effective date is as much a part of the regulations as the substantive parts.

The explanations contained in the regulations for the exemption clause are "recent firm congressional guidelines contained in amendments to the Clean Air Act," compelling administrative reasons, and the need to minimize disruptive effects on industry. (39 Fed. Reg. at 7272-7273.) A review of the sufficiency of these reasons requires an examination of the administrative record, which is not before us now but would be if this were a petition for review.

The exemption provision is an integral part of the regulations and, like any other part, must be reviewed in a petition for review. It cannot be reviewed by an action filed in the district court.

Plaintiffs have in fact filed a separate petition for review of the indirect source regulations in this court (No. 74-1231), and that petition, together with others filed in various other circuits attacking the indirect source regulations, has been transferred on the EPA's motion to the Court of Appeals for the District of Columbia (No. 74-1595 in that court). Their contentions concerning the validity of the exemption provision will presumably be determined in that litigation.

The Failure to Promulgate Significant Deterioration Regulations for Automobile-Related Pollutants

Regulations for two air pollutants, particulate matter and sulfur dioxide, having been promulgated after the complaint was filed (see note 2, *supra*), plaintiffs now seek to require the Administrator to promulgate regulations for carbon monoxide and the other automobile-related pollutants for which he had established national ambient air standards.

As the District Court pointed out, the Administrator has already been ordered in *Sierra Club* v. *Ruckelshaus, supra,* to promulgate significant deterioration regulations. Counsel for the government, in their brief in this court, represented that the Administrator had complied with this order, and "[t]herefore, since the significant deterioration regulations have already been published, the issue of any prior failure to promulgate them is rendered moot." Because, as is apparent from the regulations and the Administrator's introductory statement accompanying them (39 Fed. Reg. 42,510 (Dec. 5, 1974)), and as counsel for the government acknowledged during oral argument, the regulations that have been promulgated relate to only two of the six identified pollutants, the case is not moot as to this point. Whether there is a need for a second order against the Administrator to do that which he has already been ordered to do in the *Sierra Club* case is a question we need not reach, because we find that this claim is not maintainable by plaintiffs at this time.

Section 304(a) of the Amendments, 42 U.S.C. § 1857h—2(a), provides in pertinent part as follows:

> "Except as provided in subsection (b), any person may commence a civil action on his own behalf—
>
> . . .
>
> "(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator."

Subsection (b), 42 U.S.C. § 1857h—2(b), imposes the following limitation upon this right to sue:

> "No action may be commenced—
>
> . . .
>
> "(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, ..."[3]

Plaintiffs failed to give the Administrator sixty days notice prior to commencing suit, which the District Court held was fatal to its jurisdiction under section 304. The court reasoned that the purpose of the sixty-day notice requirement was to give the Administrator time to assess and respond to difficult, multi-count lawsuits, to deploy attorneys from Washington, if necessary, and to arrange for the on-going process of regulatory development and other substantive EPA concerns despite the interruption caused by a pending lawsuit. The statute's sixty-day notice requirement would be nullified, said the court, if plaintiffs were required to do nothing more than comply with Fed. R. Civ. P. 12(a), which grants the United States, or an officer or employee thereof, sixty days in which to answer a complaint in any civil suit. *City of Highland Park* v. *Train, supra,* 374 F.Supp. at 766-767. In accord with the District Court's holding are *Pinkney* v. *Ohio Environmental Protection Agency, supra,* 375 F.Supp. at 308, and *West Penn Power Co.* v. *Train, supra,* 378 F.Supp. at 944. *Cf. Metropolitan Washington Coalition for Clean Air* v. *District of Columbia,* 373 F.Supp. 1089, 1092 (D.D.C. 1974).[4] *Contra, Riverside* v. *Ruckelshaus,* 4 E.R.C. 1728 (C.D. Cal 1972).[5]

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3. The statute also specifies certain exceptions to this notice requirement that are not applicable here.

4. The *Metropolitan Washington Coalition* case is consistent, in our view, with the holding of *Pinkney* and *West Penn Power Co.* The plaintiffs in *Metropolitan Washington Coalition,* although they failed to give the required sixty-day notice before filing their first complaint, filed a subsequent complaint raising the same issues more than sixty days after the service of the first. This, as the court held, in substance afforded the Administrator the sixty-day notice to which he was entitled under section 304(b).

5. In response to the Administrator's argument that plaintiffs' failure to comply with the statutory notice requirement of section

The legislative history of section 304 shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304.[6] Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored.[7]

The language chosen by Congress makes it clear that the Administrator is to be given notice in addition to that required by Rule 12(a), Fed. R. Civ. P., which allows him sixty days to answer or move against a complaint by which an action is commenced. Section 304(b)'s statutory command plainly states that "[n]o action *may be commenced . . . prior* to 60 days *after* the plaintiff has given notice of such action to the Administrator." (Emphasis supplied.) Plaintiffs made no attempt whatsoever to comply with the notice provision, and their suit therefore could not properly be commenced.

304(b)(2) barred jurisdiction under the Clean Air Act, the *Riverside* court found that personal service on the Administrator coupled with a lapse of sixty days between the date of filing the complaint and the date of completion of a hearing on plaintiff's request for a preliminary injunction, amounted to "substantial compliance" with the sixty-day notice requirement and gave the Administrator "the beneficial effect" of the requirement. (4 E.R.C. at 1731.)

6. See S. Rep. No. 1196, 91st Cong., 2d Sess., 36-39 (1970), reproduced at 116 Cong. Rec. 32926-27 (1970); 116 Cong. Rec. 33102-03 (1970); Conf. Rep. No. 91-178, 91st Cong., 2d Sess., U.S. Code Cong. & Admin. News 5374, 5388 (1970).

7. See Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 San Diego L. Rev. 107, 132 (1974), which discusses the beneficial impact that the statutory notice provision of section 304 has in allowing the EPA an opportunity to react to citizen complaints before a suit is filed, in some cases obviating the need for citizen suits.

Alternatively, plaintiffs argue that other remedies are available. The first of these is statutory mandamus, 28 U.S.C. § 1361, which provides that "district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Among the courts and legal scholars there have been repeated efforts to ascertain the precise scope and limitations of section 1361.[8] For purposes of the present case, however, we need not be concerned with defining the jurisdictional reach of that section. However broad its scope, mandamus cannot be invoked to require the District Court to order the Administrator to promulgate significant deterioration regulations.

The traditional principles generally recognized as controlling the issuance of a writ of mandamus were concisely stated by the court in *Lovallo* v. *Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973), as follows:

> "(1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available."

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8. Though it is undisputed that Congress intended 28 U.S.C. § 1361 to extend mandamus jurisdiction, formerly exercised only by the District Court for the District of Columbia, to district courts elsewhere, and thereby authorize suits against officials who fail to perform ministerial acts, there is some doubt concerning whether the purview of the common law writ of mandamus was broadened by the inclusion of the words "in the nature of" before the word "mandamus" in section 1361, or whether Congress meant only to make the writ available as it was at common law. Compare *Burnett* v. *Tolson*, 474 F.2d 877, 880 (4th Cir. 1973), *State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099, 1104-1105 n. 6 (8th Cir. 1973), and *Peoples* v. *United States Dep't of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970) with K. Davis, *Administrative Law Treatise* § 23.09 (Supp. 1970), and Byse & Fiocca, *Section 1361 on the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 318-320 (1967). For cases adopting the traditional and more prevalent view of section 1361 see *Carter* v. *Seamans*, 411 F.2d 767, 773 n. 11 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

See also *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937).

There is, as we have have seen, another remedy available, that provided in section 304(a)(2) of the Clean Air Amendments of 1970, which affords any person a direct remedy to compel the Administrator to perform a non-discretionary duty. Plaintiffs have not shown that the necessity of complying with the notice provision rendered that remedy inadequate in this case.

It is, accordingly, unnecessary for us to reach the question of whether there exists that "plainly defined" duty (*Lovallo* v. *Froehlke, supra*, 468 F.2d at 343), the performance of which is positively commanded and so plainly prescribed as to be free from doubt (*United States* v. *Walker*, 409 F.2d 477, 481 (9th Cir. 1969)), that is necessary to warrant the issuance of a writ of mandamus. We do note that the matter was doubtful enough to cause the Administrator, whose expertise in interpreting the statute is entitled to weight, to conclude that the duty did not exist and to cause the Supreme Court in the *Sierra Club* case to divide equally on the question of whether he was right. *But cf. Roberts* v. *United States*, 176 U.S. 221, 231 (1899).

Plaintiffs also argue that the District Court had jurisdiction to grant the relief requested against the Administrator under 28 U.S.C. § 1331, the general federal question statute, and the revised Administrative Procedure Act, 5 U.S.C. §§ 702-705.

Until the mandamus statute, 28 U.S.C. § 1361, was adopted in 1962, the federal district courts did not have mandamus jurisdiction, *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U.S. 109 (1906), except in the District of Columbia, *Fagan* v. *Schroeder*, 284 F.2d 666, 668 (7th Cir. 1960), where it existed through historical accident. S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S. Code Cong.

& Admin. News 2784, *et seq.* Section 1361 was adopted to remedy this deficiency and give mandamus jurisdiction to district courts outside the District of Columbia. (*Id.*) In light of this history, it might be questioned whether relief in the nature of mandamus should be granted in an action in which subject matter jurisdiction is based on section 1331.[9] Assuming, however, that the equivalent of mandamus is available through the court's equity powers, the existence of another adequate remedy would still preclude relief. This is not the kind of case in which it would be appropriate for federal courts to "adjust their remedies so as to grant the necessary relief" for the invasion of federally protected rights. *Cf. Bell* v. *Hood*, 327 U.S. 678, 684 (1946). There is no need for a new remedy, because, as we have said, an adequate statutory remedy for protecting rights of the kind asserted by plaintiffs is provided by the very statute that creates the rights.

The revised Administrative Procedure Act, insofar as pertinent here, defines agency action which is subject to judicial review under that act as "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. Here, as we have held, there is the "other adequate remedy in a court," provided by section 304 of the Clean Air Amendments of 1970, and, while that statute makes the Administrator's failure to promulgate regulations reviewable, it does so subject to a condition which has not been met here, compliance with the notice requirement. The agency action here is "made reviewable by statute" only if the condition is met.

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9. The Supreme Court's view once was that a mandatory injunction could not be used to achieve the same results as mandamus, *e.g., Smith* v. *Bourbon County*, 127 U.S. 105 (1888), but later decisions tend to suggest otherwise, *Virginia Ry.* v. *System Federation*, 300 U.S. 515, 551 (1937), *cf. Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958), and a number of lower courts have used mandatory injunctions to perform the function of mandamus. See H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 1384-1385 & n. 6 (2d ed. 1973).

In *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 698-703 (D.C. Cir. 1975), the majority held that under the Federal Water Pollution Control Act, the pertinent provisions of which are substantially the same as those of the Clean Air Act, judicial review could be obtained under the Administrative Procedure Act, 5 U.S.C. § 704 and, apparently, under 28 U.S.C. § 1331 also, and refers to the Clean Air Act and its legislative history as a basis for its holding. The majority's opinion does not contain a discussion of the meaning of the phrase "made reviewable by statute" in 5 U.S.C. § 704, but bases its holding on the saving provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), which is substantially the same as the saving provision in section 304 of the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(e), and the statements in the legislative history that other remedies were not impaired by the act. The opinion does not give any reasons for the court's apparent holding that jurisdiction was also conferred by 28 U.S.C. § 1331. Judge Robb's dissent argues that the 60-day notice requirement should control. (510 F.2d at 730-731.) With deference, we believe that the saving provision, expressing the general intention of Congress not to disturb existing rights to seek relief, does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights. We conclude, for the reasons stated above, that the conditions imposed by existing law upon the right to seek relief under either 28 U.S.C. § 1331 or 5 U.S.C. § 704 have not been met. We are not holding that if the remedy provided by the statute were inadequate in the circumstances of a partcular case, other remedies would be unavailable.[10]

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10. The portion of this opinion dealing with the availability of remedies other than the right of action provided by section 304 to review the Administrator's failure to promulgate signfiicant deterioration regulations has been circulated among all the judges of this court in regular active service, in view of the possible inconsistency between our holding and that of the Court of Appeals for the District

The final additional basis for jurisdiction alleged in the complaint, but not urged here, is the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. While the availability of another remedy does not preclude declaratory relief, a court may properly decline to assume jurisdiction in a declaratory action when the other remedy would be more effective or appropriate (6A J. Moore, *Federal Practice* ¶ 57.08[3], p. 57-43 (2d ed. 1974)), as we find to be the case here.

Dispositions as to Counts I and II

Since neither judicial review of the indirect source regulations nor mandatory relief to compel the promulgation of significant deterioration regulations for pollutants related to automobiles is available in the proceedings before us, there is no basis in the allegations of Counts I and II for plaintiffs' demand for an injunction against further construction on the highway expansion and the shopping center until their claims concerning these regulations are finally resolved. We cannot find at this stage a sufficient likelihood that regulations entitling plaintiffs to such injunctive relief will ultimately be promulgated to justify an award of injunctive relief. We therefore affirm the dismissal of Counts I and II.

Count III: Absence of an Environmental Impact Statement

Plaintiffs allege in Count III that portions of the expansion of Lake-Cook Road are to be constructed with federal funds, and that the United States Department of Transportation was therefore required by the National Environmental Policy Act of 1969 ("NEPA," 42 U.S.C. §§ 4321, *et seq.*) to prepare an environmental impact statement concerning the expansion, which has not been prepared. They seek an order requiring the preparation of such a statement and an injunction prohibiting

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of Columbia Circuit. No member of the court voted to rehear the case in banc.

the construction of the improvements on the road by Cook County Department of Highways until the statement is prepared. The motions to dismiss by the defendants under this count were supported and opposed by affidavits and documents, and therefore were treated by the District Court, under the authority of Rule 12(c), Fed. R. Civ. P., as motions for summary judgment. The court granted the motions.

Plaintiffs now question the propriety of deciding the issues under Count III by a summary judgment. They appear not to have raised this question when they submitted matter outside the pleadings in opposition to the motions, and did not suggest in their papers in opposition in the District Court the existence of any other evidence bearing on the issues. They had ample opportunity to present all material pertinent to the motion. The court properly determined that there was no genuine issue as to any material fact.

NEPA requires each federal agency, before taking any "major Federal actions significantly affecting the quality of the human environment," to prepare a "detailed statement" analyzing, among other things, "the environmental impact of the proposed action." (42 U.S.C. § 4332(2)(C).) "Actions" include projects supported in whole or in part by federal funding. (40 C.F.R. § 1500.5(a)(2) (1974).) Plaintiffs contend that federal funding has been requested for a 2.47 mile segment of the Lake-Cook Road, and that therefore the requirements of NEPA are applicable to the entire road expansion project.

The documentary evidence submitted below indicates that that the 2.47 mile segment of the road has received "federal-aid secondary system" designation. Designation, however, is merely the first step in the procedure for obtaining federal funds for highway improvement. The Federal-Aid Highway Acts indicate that before federal funding is obtained the project must be programmed by a state agency for federal

funding and then approved by both the state highway department and federal authorities. (23 U.S.C. §§ 103(c), (f), 105, and 106.) It is undisputed that this designation was made long before the enactment of NEPA, and there is accordingly no basis for a contention that the road improvement project was segmented to circumvent the Act. See *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 633-636 (E.D. Va. 1973), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

Plaintiffs submitted, in opposition to the motion, documents which they contend prove that federal funds have been applied for. They consist of a letter from the County Department of Transportation transmitting a county resolution to have Federal Aid Secondary Route ("FAS") 122 (the approximately .5 mile segment between Pfingston and Waukegan Roads) programmed for federal funding; the resolution itself; the Illinois Department's letter to the County Department approving the resolution; a similar set of letters and a resolution concerning FAS 1013 (the approximately 2 mile segment between Sanders and Pfingston Roads); and a document entitled "Draft/Combined Corridor and Design Environment Statement/ Administrative Action for Federal Aid Secondary Routes 1013 & 122," which is not signed and has "Preliminary 11/16/73" written across it. These documents give no indication of federal involvement up to that point in the approval process. Defendants submitted affidavits showing that there has been no programming by the State of Illinois for federal funding of the Lake-Cook Road improvement project, and that no application for federal funds has been made. Counsel for the Cook County Department of Highways represented at oral argument that these facts were unchanged.

Thus the documents relied on by plaintiffs show nothing more than a possibility that federal funds might be applied for. The affidavits establish that no federal funds have in fact been applied for.

One case sustained a preliminary injunction against construction of a highway project for failure to comply with a federal relocation statute,[11] holding that the project for a part of the federal-aid primary system became a federal-aid highway project for purposes of that statute when it received location approval[12] prior to any application for federal funds. *La Raza Unida* v. *Volpe*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). That case was not decided under NEPA, which applies to proposed major federal actions and not to a federal-aid secondary designation that took place long before NEPA was adopted or to possible federal funding that is not proposed at present. And, as the district court in *River* v. *Richmond Metropolitan Authority, supra*, stated: "Notwithstanding the fact that *La Raza Unida* declared a highway project to be federal early in the planning process, it most assuredly did not hold that a project could be federal where no federal participation had ever taken place." 359 F.Supp. at 634. Possible future federal funding is all that the plaintiffs in the case at bar have shown.

The Lake-Cook Road improvement appears from the summary judgment papers to be a state project on which no federal action is proposed, and therefore, NEPA's requirement of an environmental impact statement does not apply to the project. See *Citizens for Balanced Environment and Transportation, Inc.*

11. Determining that this failure was a sufficient ground for granting preliminary relief, the district court found it unnecessary to reach the question of whether defendants also violated NEPA, which was alleged by plaintiffs. *La Raza Unida* v. *Volpe*, 337 F.Supp. 221, 234 (N.D. Cal. 1971). The Court of Appeals did not refer to NEPA.

12. The district court defined location approval as the second stage of a highway project, in which the route is specifically established within a corridor which has previously been defined. (*Id.* at 223-224.) Location approval cannot take place unless the state highway department requests it and until a corridor public hearing is held on the project. (23 C.F.R. §§ 790.9(e)(1), 790.2(a) (1974).) Nothing comparable to these procedures has taken place in the present case.

v. *Volpe*, 503 F.2d 601 (2d Cir. 1974); *Civic Improvement Committee* v. *Volpe*, 459 F.2d 957 (4th Cir. 1972); *cf. Bradford Township* v. *Illinois State Toll Highway Authority*, 463 F.2d 537, 540 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1972).

Count IV: *The Equal Protection Challenge to the Zoning Ordinance*

Plaintiffs allege in amended Count IV that the Village of Northbrook and its trustees have deprived them of the equal protection of the laws as guaranteed by the Fourteenth Amendment and seek a judgment declaring invalid Northbrook's zoning approval of the proposed shopping center complex and an injunction "barring future zoning approval until Northbrook demonstrates that its residents have been subjected to similar environmental assaults." Jurisdiction is purportedly predicated upon 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory judgment remedy); and 42 U.S.C. § 1983 (deprivation of constitutional or federal statutory rights under color of state law), and its jurisdictional correlative, 28 U.S.C. § 1343.

Plaintiffs allege in substance that, upon information and belief, Northbrook and its trustees have "aggressively protected" its residential areas from intrusion by massive commercial developments such as the proposed shopping center complex; that their action in giving zoning approval to the proposed shopping center complex will cause the eventual subjection of plaintiffs to "vast increase in noise and air pollution as well as aesthetic destruction of the quiet residential character of their community;" and that by exposing plaintiffs to these environmental hazards, while protecting Northbrook residents from intrusion of similar developments, Northbrook has discriminated against them in violation of the Fourteenth Amendment. The amendment to the complaint, in which plaintiffs joined the trustees of the Village of Northbrook as additional defendants, did not

specify any relief sought against them. The village and the trustees moved to dismiss Count IV of the complaint for want of jurisdiction as to it under 42 U.S.C. § 1983 and for failure to state a claim for which relief could be granted.

As the District Court correctly held (*City of Highland Park* v. *Train, supra,* 374 F.Supp. at 773), there is no jurisdiction under 42 U.S.C. § 1983 over the claim against the village. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 513 (1973). Assuming the existence of jurisdictional amount, we have jurisdiction against the village on the claim based upon the Fourteenth Amendment under 28 U.S.C. § 1331. The absence of any specific request for relief against the trustees may have justified dismissal as to them, but in any event the complaint, as amended, states no claim on which relief could be granted against either the trustees or the village.

A zoning ordinance is clothed with every presumption of validity. *City of Ann Arbor, Mich.* v. *Northwest Park Constr. Corp.,* 280 F.2d 212, 223 (6th Cir. 1960). Derived from the states' police power, the legislative authority which grants municipalities the power to adopt and enforce zoning ordinances and regulations is not to be narrowly confined. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 5-8 (1974); *cf. Berman* v. *Parker,* 348 U.S. 26, 32-33 (1954). Unless it is based upon a suspect classification or impinges upon a fundamental right (see *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. at 6, 7), which is not true in the case at bar, zoning legislation may be held unconstitutional only if it is shown to bear no possible relationship to the state's interest in securing the health, safety, morals, or general welfare of the public and is, therefore, manifestly unreasonable and arbitrary. *E.g., Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 395 (1926);*Gorieb* v. *Fox,* 274 U.S. 603, 610 (1927); *Aquino* v. *Trobiner,* 298 F.2d 674, 677 (D.C. Cir. 1961). Thus the scope of judicial review is limited.

It is well established that "[i]n the area of economics and social welfare, a States does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because . . . 'in practice it results in some inequality.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1960); see *Village of Belle Terre* v. *Boraas, supra,* 416 U.S. at 8; *Sinclair Refining Co.* v. *City of Chicago,* 178 F.2d 214, 217 (7th Cir. 1950). As the Supreme Court observed in *Village of Euclid* v. *Ambler Realty Co., supra:* "[L]aws may . . . find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." (272 U.S. at 389.)

Inherent in all zoning legislation are statutory distinctions which give rise to claims of disparity of treatment. Inevitably areas zoned for nonresidential uses will touch areas zoned for residential uses, and the burden of the zoning always falls most heavily on the residents adjacent to the boundary. This is essentially all that plaintiffs have alleged here, except that they have framed their grievance in the rhetoric of equal protection.

Plaintiff residents of Highland Park and Glenbrook Countryside allege no classification other than the distinction between residents in close proximity to the proposed shopping center and residents who live farther away. Such a classification, inherent in all zoning, is not within the purview of the Fourteenth Amendment. *Cf. L'Hote* v. *City of New Orleans,* 177 U.S. 587, 597 (1899). "Some must suffer by the establishment of any territorial boundaries. . . . If these limits hurt the [appellants], other limits would hurt others."(*Id.*) So long as such legislation applies equally to all persons similarly situated in a given locale, there can be no violation of the Equal Protection Clause. *Cf. Caskey Baking Co.* v. *Virginia,* 313 U.S. 117, 121 (1941); *United States* v. *Holmes,* 387 F.2d 781, 785 (7th Cir. 1967), *cert. denied,* 391 U.S. 936 (1968).

Zoning is not rendered unconstitutional by the fact that any direct benefit the plaintiffs may receive from it is less than the possible burdens it may impose upon them. Plaintiffs having failed in Count IV to state a claim upon which relief can be granted, the District Court's dismissal of that count is affirmed.

The Petition for Review

On January 6, 1975, plaintiffs filed in this court a petition for review, No. 75-1006, seeking review of the significant deterioration regulations promulgated by the Administrator on December 5, 1974. That petition which states as petitioners' sole grievance the Administrator's failure to promulgate significant deterioration regulations with respect to carbon monoxide and other automobile related pollutants was consolidated with No. 74-1271 on the representation by petitioners that the same substantive issues were involve in the two cases, the court viewing the petition for review as an attempt by petitioners to "safeguard their jurisdictional grounds." (Order of February 11, 1975, denying motion to reconsider consolidation.)

No brief has been submitted in support of the petition for review. We therefore do not have the benefit of petitioners' views as to the appropriateness of a petition for review to compel the Administrator to act. We think, however, that the function of a petition for review is to invoke a review for correctness by the Court of Appeals of regulations adopted by the Administrator and not to compel the Administrator to act when he has failed to act. Petitioners, in their petition for review, do not challenge the significant deterioration regulations on particulate matter and sulfur dioxide which the Administrator has promulgated. Their petition rather complains that the Administrator "continues in his failure" to promulgate regulations relating to carbon monoxide and other motor vehicle related pollutants. The appropriate procedure for compelling the Administration to act is that provided in section

304(a), *supra*, which expressly provides for an action in the district court "against the Administrator when there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." Plaintiffs recognized this when they brought their action under section 304(a), but they failed to give statutory notice that would have made their action viable. The petition for review is dismissed.

AFFIRMED in No. 74-1271; Petition for Review DISMISSED in No. 75-1006.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 24, 1975

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,
Plaintiffs-Appellants,

No. 74-1271 vs.

RUSSELL E. TRAIN, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 C 3027

Bernard M. Decker, *Judge.*

No. 75-1006

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,
Petitioners,

vs.

RUSSELL E. TRAIN, etc., et al.,
Respondents.

Petition for Review of an Order of the Environmental Protection Agency.

ORDER

The opinion filed June 10, 1975 is revised and corrected in the respects shown in the revised and corrected opinion filed this date.

The petition for rehearing is denied.

OPINION MODIFIED BY JUDGE TONE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 24, 1975

Before

HON WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,
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Petitioners,

No. 75-1006 *vs.*

RUSSELL E. TRAIN, etc., et al.,
Respondents.

Petition for Review of an Order of the Environmental Protection Agency.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and the Environmental Protection Agency, and were argued by counsel. On June 10, 1975 an opinion was entered by this Court.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in appeal No. 74-1271 be and the same is hereby AFFIRMED, with costs, and the Petition for Review in appeal No. 75-1006 be and the same is hereby DISMISSED, in accordance with the modified opinion of this Court filed this date.

OPINION BY JUDGE TONE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1975

Before

HON WALTER J. CUMMINGS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,
Plaintiffs-Appellants,

No. 74-1271 vs.

RUSSELL E. TRAIN, etc., et al.,
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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 C 3027

Bernard M. Decker, *Judge.*

THE CITY OF HIGHLAND PARK, ILLINOIS, etc., et al.,
Petitioners,

No. 75-1006 *vs.*

RUSSELL E. TRAIN, etc., et al.,
Respondents.

Petition for Review of an Order of the Environmental Protection Agency.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and the Environmental Protection Agency, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in appeal No. 74-1271 be and the same is hereby AFFIRMED, with costs, and the Petition for Review in appeal No. 75-1006 be and the same is hereby DISMISSED, in accordance with the opinion of this court filed this day.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1271

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
Plaintiffs-Appellants,

v.

RUSSELL E. TRAIN, ETC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 73 C 3027
Bernard M. Decker, *Judge.*

No. 75-1006

THE CITY OF HIGHLAND PARK, ILLINOIS, ETC., ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

Petition for Review of an Order of the Environmental Protection Agency

Argued Februrary 21, 1975—Decided June 10, 1975

Before CUMMINGS, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* In the principal case before us in these consolidated proceedings, No. 74-1271, plaintiffs sue to block the construction of a shopping center and the extension

and widening of the road along which the shopping center is to be built, relying upon the Clean Air Amendments of 1970, the National Environmental Protection Act, and the Equal Protection Clause of the Fourteenth Amendment. They seek to compel the Administrator of the Environmental Protection Agency to promulgate "indirect source" and "significant deterioration" regulations which they hope would preclude the construction of the shopping center and the road expansion (Counts I and II) and to enjoin the road expansion until the Department of Transportation has filed an environmental impact statement pursuant to the National Environmental Protection Act (Count III). Plaintiffs also allege that the Village of Northbrook has denied them equal protection by the adoption of a zoning ordinance which permits the construction of the shopping center (Count IV).

The District Court dismissed the claims under the Clean Air Amendments for failure to comply with the 60-day notice requirement of section 304, 42 U.S.C. § 1857h-2, for failure to state a claim on which relief can be granted, and on the ground that some of the relief requested was already the subject of orders issued by other federal courts. Finding it undisputed that there was no federal involvement in the road expansion project, the court granted summary judgment on the claim that an environmental impact statement should have been filed. The equal protection claim was also held to be without merit. The court entered an order dismissing the action, *City of Highland Park* v. *Train*, 374 F.Supp. 758 (N.D. Ill. 1974), from which plaintiffs appeal and which we affirm.

Plaintiffs are two municipalities adjacent to the site of the proposed shopping center, a non-profit corporation dedicated to protecting the environment in the area, and various individuals who reside near the site. The defendants are the Administrator of the Environmental Protection Agency, the agency itself, the Secretary of the Department of Transportation, the department itself, the Department of Highways of Cook County,

Illinois, the developers of the shopping center, proposed tenants of the shopping center, the Village of Northbrook, in which the shopping center will be located, and the trustees of the village.

The right of way of Lake-Cook Road extends from Lake Michigan along the entire boundary between Lake and Cook Counties to the western end of the boundary and continues on west to the Fox River. Between Milwaukee Avenue and Rand Road, the road is not completed. Where it is completed, it is, for the most part, two lanes wide. In 1967 the Cook County Highway Department initiated plans to expand the completed portions of the road to four lanes and to construct a four-lane extension on the right-of-way where no actual roadway presently exists.

In January, 1973, certain of the defendants anounced a plan for the construction of a shopping center on the south side of Lake-Cook Road between Skokie Highway and Waukegan Road. The shopping center, according to the complaint, will occupy one million square feet, have a parking lot accommodating 5,000 cars, and generate 28,400 vehicle trips per day. Ninety percent or more of this traffic will be carried by Lake-Cook Road, the only through-street which provides access to the shopping center. Plaintiffs allege that this traffic "will overwhelm even the proposed four lane expanded roadway," and cause "intolerable" congestion at the intersections of Lake-Cook Road and Skokie Highway and Waukegan Road. As a result, residents of the area will be subjected to substantial "noise and discomfort in the use of their homes and in the use of the streets in their community" and will be exposed to increases in the concentration of carbon monoxide in the ambient air by more than 66 percent over existing levels.

The Clean Air Amendments and Their Implementation

To explain plaintiffs' claims under the Clean Air Amendments of 1970, it is necessary to begin by summarizing pertinent parts of that legislation and its implementation by actions of the

Administrator and the states and by certain court decisions. The background and a more complete history of the amendments and their implementation to date appear in Mr. Justice Rehnquist's opinion for the Supreme Court in *Train* v. *Natural Resources Defense Council, Inc.*, 43 U.S.L.W. 4467 (U.S. April 16, 1975).

When the states did not act to fulfill their "primary responsibility" for prevention of air pollution under earlier federal clean air legislation. "Congress reacted by taking a stick to the states in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year." *Train* v. *Natural Resources Defense Council, Inc., supra*, 43 U.S.L.W. at 4468. The 1970 Amendments established a program to control air pollution to be carried out by the federal government and the states. The parts of the Amendments pertinent here may be summarized as follows:

The Administrator was required, before specified dates, to publish a list of air pollutants and issue "air quality criteria" containing information about each listed pollutant and its effects on the air. (Section 108, 42 U.S.C. § 1857c—3.) He was also required to establish national "ambient air quality standards" for each air pollutant for which air quality criteria were issued. (Section 109, 52 U.S.C. § 1857c—4.) The states have primary authority to establish "implementation plans" to achieve these standards, but these plans are subject to review by the Administrator. (Section 110, 42 U.S.C. § 1857c—5.)

Two sets of standards were to be prescribed by the Administrator, "primary standards," the "attainment and maintenance of which, in the judgment of the Administrator, based on [air quality] criteria and allowing an adequate margin of safety, are requisite to protect the public health;" and "secondary standards," which "shall specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with

the presence of such air pollutants in the ambient air." (Section 109(b), 42 U.S.C. § 1857c—4(b).) The Administrator prescribed these standards within the time allowed him by the Act.

Within nine months after the Administrtor's promulgation of the national standards, each state was to submit to him a plan providing for the "implementation, maintenance, and enforcement" of the standards. (Section 110(a)(1), 42 U.S.C. § 1857c—5(a)(1). Each state plan was required to provide for the attainment of the national primary standards "as expeditiously as practicable" and not later than three years after the date the Administrator approved the plan. (Section 110(a)(2)(A)(i), 42 U.S.C. § 1857c—5(a)(2)(A)(i.) The national secondary standards were to be met within a "reasonable time" to be specified in the plan. (Section 110(a)(2)(A)(ii), 42 U.S.C. § 1857c—5(a)(2)(A)(ii).) Each state plan was to include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." (Section 110(a)(2)(B), 42 U.S.C. § 1857c—5(a)(2)(B).) Other prerequisites to approval by the Administrator are set forth in the Act. (Section 110(a)(2)(C) through (H), 42 U.S.C. § 1857c—5(a)(2)(C) through (H).)

Within four months after the date a state plan was required to be submitted, the Administrator was required to review the plan to determine whether it satisfied the statutory requirements and to approve or disapprove the plan or each portion thereof. Section 110(a), 42 U.S.C. § 1857c—5(a). If the Administrator determined that a state's plan or any portion thereof did not satisfy the statutory requirements, he was to disapprove the plan, or the offending portion thereof, and, within six months after the date the plan was required to be submitted, promulgate his own implementation plan or portion thereof for that state. (Section 110(c)(1), 42 U.S.C. § 1857c—5(c)(1).)

Significant Deterioration Regulations

During the period he was reviewing state plans, the Administrator questioned his authority to require those plans to protect against "significant deterioration" of air quality in areas in which the air was cleaner than required by the national standards, when that significant deterioration would not result in pollution violative of the national standards. He took the position that he would not demand such provisions in state plans. See *Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253, 254 (D.D.C. 1972), *aff'd per curiam*, 4 E.R.C. 1815 (D.C.Cir. 1972), *aff'd by an equally divided Court sub nom. Fri* v. *Sierra Club*, 412 U.S. 541 (1973). In the *Sierra Club* case the court held, on motion for preliminary injunction, that the Administrator had a non-discretionary duty to protect the air quality from significant deterioration and issued a preliminary injunction prohibiting him from approving state plans "which allow pollution levels of clean air to rise to the secondary standard level of pollution." 344 F.Supp. at 256.[1] The court ordered the Administrator to promulgate proposed significant deterioration regulations within six months as to any state plan which permitted or failed to take measures sufficient to prevent significant deterioration. 2 E.L.R. 20262, 20263.

As a result of that decision the Administrator again reviewed all state implementation plans and disapproved them to the extent that they failed to prevent significant deterioration of air quality. (40 C.F.R. § 52.21 (1974), 37 Fed. Reg. 23,836 (Nov. 9, 1972).) One of the plans affected was that of Illinois, which had been submitted to the Administrator on January 31, 1972, and given partial approval on May 26, 1972. (40 C.F.R. § 52.722 (1974), 37 Fed. Reg. 10,842 (May 31, 1972).) In response to his duty under the court's order in the *Sierra Club*

1. See also *Natural Resources Defense Council, Inc.* v. *Train*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, supra*, 43 U.S.L.W. 4467; *Exxon Corp.* v. *City of New York*, 372 F.Supp. 335, 339 (S.D.N.Y. 1974).

case the Administrator proposed (38 Fed. Reg. 18,986 (July 16, 1973)) and reproposed (39 Fed. Reg. 31,000 (Aug. 27, 1974)) rules on the prevention of significant air quality deterioration. Eventually he promulgated regulations for two of the six air pollutants for which he had earlier promulgated national ambient air quality standards under his statutory duty.[2] (39 Fed. Reg. 42,510 (Dec. 5, 1974).) These regulations are intended to prevent significant deterioration in the quality of air for two pollutants, particulate matter and sulfur dioxide, by limiting increases in the concentrations of those pollutants in areas where the present level of pollution is less than required by the national ambient air quality standards. This is to be accomplished by dividing those areas in which the level of pollution does not presently exceed the national ambient air quality standards into three classes in which increases in concentration of the two pollutants are limited by different amounts. The Administrator originally classified all areas, but the states, after a public hearing and subject to other requirements, may submit to the Administrator proposals for reclassification of areas. No final regulations have been promulgated for the other four pollutants as of yet. The Administrator, therefore, has not yet complied with the *Sierra Club* order.

Indirect Source Regulations

When the Administrator gave partial approval to the Illinois implementation plan on May 26, 1972, he also granted to Illinois, as he did to a number of other states, extensions until February 15, 1973, to submit the transportation portion of its

2. The six pollutants originally identified were sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. (40 C.F.R. §§ 50.4—50.11 (1974).) The original proposed rules referred to in the text broadened "nitrogen dioxide" to "nitrogen oxide" and omitted photochemical oxidants, apparently because they are formed from hydrocarbons and nitrogen dioxides and do not exist otherwise, and therefore do not require separate treatment. This part of the proposed rules required only that the best possible technology be used.

implementation plan. Several other states were given until mid-1977 to attain the national primary standards. (37 Fed. Reg. 10,842 (May 31, 1972).) The Court of Appeals for the District of Columbia, on a petition for review, held that this extension was not authorized by the Act, and also found that the record did not show whether the Administrator had conducted a state-by-state determination on the efficacy of the state plans to provide for the maintenance of the primary and secondary standards beyond May 31, 1975. *National Resources Defense Council, Inc.* v. *EPA*, 475 F.2d 968, 970, 971-972 (D.C. Cir. 1973). The court established a new time schedule under which the Administrator was to review the maintenance provisions of the state plans and disapprove those which he determined did not contain sufficient measures for maintenance of the primary standard. (*Id.* at 972.) In this re-examination, the Administrator found that none of the state plans, including that of Illinois, contained adequate provisions for insuring the maintenance of national standards, but granted the states another opportunity to develop adequate programs. (40 C.F.R. § 52.22(a) (1974), 38 Fed. Reg. 6280 (March 8, 1973).)

The Administrator, pursuant to the order of the Court of Appeals for the District of Columbia in *Natural Resources Defense Council, Inc.* v. *EPA*, then promulgated regulations to insure the maintenance of national standards by requiring state implementation plans to contain procedures for review of any new stationary source or modification that might "interfere with attainment or maintenance of a standard either directly because of emissions from it, or indirectly, because of emissions resulting from mobile source activities associated with it." (40 C.F.R. § 51.18 (1974), 38 Fed. Reg. 15,834, 15,836 (June 18, 1973).) He suggested guidelines to assist the states in complying with the requirements of section 51.18. (See Appendix O to 40 C.F.R. § 51.18.)

The Administrator was also required by *National Resources Defense Council, Inc.* v. *EPA*, to promulgate indirect source

review regulations if states either failed to submit such regulations on their own or submitted inadequate regulations. (477 F.2d at 971.) In response to that requirement the Administrator proposed regulations (38 Fed. Reg. 29,893 (Oct. 30, 1973)), and, after public hearing in 43 states, promulgated them. (40 C.F.R. § 52.22 (1974), 39 Fed. Reg. 7279 (Feb. 25, 1974).) He also determined that since the plans of most states, including Illinois, contained inadequate provisions for review of indirect sources as required by section 51.18, the provisions of section 52.22(b) would be incorporated by reference and made a part of each of those plans. (See, e.g., 40 C.F.R. § 52.736 (1974).)

An indirect source is defined by the regulation as "a facility, building, structure, or installation which attracts or may attract mobile source activities that results in emissions of a pollutant for which there is a national standard," for example a "[parking facility." (40 C.F.R. § 52.22(b)(4)(i) (1974).) The regulations applies to any indirect source on which construction or modification is to commence after December 31, 1974. The Administrator later amended the indirect source regulations in respects not material here. (39 Fed. Reg. 25,202 (July 8, 1974).)

The Motion to Dismiss the Appeal

A motion by the defendants who are the developers of the shopping center to dismiss the appeal in No. 74-1271 against them and a prospective tenant was taken under advisement with the case. These defendants argue that a 1974 amendment to the Clean Air Act (42 U.S.C. §§ 1857c-5(c)(2)(C), (D)) and the promulgation of indirect source regulations moot Count I, the only part of the case concerning them, and that no case or controversy between them and the plaintiffs is raised in the plaintiffs' briefs because of failure to comply with Rule 28(a)(3), Fed. R. App. P., which requires a clear statement of the relief sought. The motions ground is without merit, because plaintiffs seek in Count I not only promulgation

of indirect source regulations, but also an injunction against construction of the shopping center until proper regulations have been promulgated. Since the developer defendants and the tenant defendants were necessary parties in a claim seeking such an injunction, the case is not moot as to them. The failure to state the relief sought against these defendants is not a basis for dismissal of the appeal as to them in the circumstances of this case. We therefore deny the motion to dismiss and turn to the merits of the appeal.

Counts I and II: The Regulations

In Count I of their complaint plaintiffs allege that the Administrator has been in violation of the provisions of the Act requiring him to issue two kinds of regulations: (a) significant deterioration regulations, preventing the significant deterioration of air quality in areas with air cleaner than national standards (as stated above, such regulations as to two of the six pollutants in question have now been promulgated); and (b) indirect source regulations, preventing violations of the national air quality standards by indirect sources (as stated above, these regulations have now been promulgated). They seek an order requiring him to promulgate those regulations and to halt further construction of the shopping center until its plans have been reviewed by the Administrator under both sets of regulations he is required to promulgate. In Count II the plaintiffs reallege that the Administrator has been in violation of his statutory duty to promulgate significant deterioration and indirect source regulations. In this count, however, they seek to halt construction of the Lake-Cook Road expansion and improvement project until its plans have been reviewed by the Administrator under both sets of regulations. To facilitate understanding of our analysis, we will divide our discussion of plaintiffs' claims by considering separately plaintiffs' rights to obtain promulgation of the two sets of regulations

rather than by considering separately Counts I and II of their complaint.

Review of the Indirect Source Regulations

The Administrator having promulgated indirect source regulations after the complaint was filed, plaintiffs' grievance now is that those regulations exempt indirect sources on which construction was commenced before January 1, 1975, as it was on the shopping center involved in this case.

Section 307(b)(1) of the Amendments, 42 U.S.C. §1857h—5(b)(1), provides in pertinent part:

> "A petition for review of the Administrator's action in . . . promulgating any implementation plan under section 1857c—5 of this title [section 110 of the Amendments]... may be filed only in the United States Court of Appeals for the appropriate circuit."

The indirect source regulations are subject to this section. Entitled "Review of Indirect Sources" (39 Fed. Reg. 7270-7285 (Feb. 25, 1974)), they purport to be promulgated pursuant to section 110, 42 U.S.C. § 1857c—5. It is so stated in the Administrator's comments in the first part of the regulations. Furthermore, the regulations contain the subtitle, "Approval and Promulgation of Implementation Plans," which is the statutory language used in section 307. The regulations set out the national standards for regulation of indirect sources, disapprove various parts of state implementation plans, and incorporate the federal standards into those plans. For example, Subpart O deals with Illinois and provides:

> "Subpart O—Illinois
>
> "25. Subpart O is amended by adding § 52.736 as follows:
>
> "§ 52.736 Review of new sources and modifications.
>
> "(a) The requirements of § 51.18 of this chapter are not met because the State failed to submit a plan for review of new or modified indirect sources.

> "(b) *Regulation for review of new or modified indirect sources.* The provisions of § 52.22(b) of this chapter are hereby incorporated by reference and made a part of the applicable implementation plan for the State of Illinois." 39 Fed. Reg. at 7281.

Since the regulations incorporate the federal standards into the state plans, the Administrator is in effect promulgating implementation plans where state plans are deficient, in accordance with section 110(c) (42 U.S.C. § 1857c—5), which is to be reviewed only under section 307(b)(1) (42 U.S.C. § 1857h—5(b)(1)).

Other courts of appeals have held under analogous circumstances that a petition for review under section 307(b)(1) is the exclusive method of review. In *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 355-356 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the court refused to permit, in an action filed in the district court, what amounted to an attack on the compliance date in regulation in the Delaware plan limiting the amount of sulfur content in burning fuel, holding that the sole remedy was a petition for review to the court of appeals under section 307(b)(1). Also supporting the rule that a petition under that section is the sole remedy for reviewing the promulgation or implementation of clean air plans and regulations are *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, ... U.S. ....., 95 S.Ct. 517 (1974); and *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973). One district court decision is squarely in point, *Pinkney* v. *Ohio Environmental Protection Agency*, 375 F.Supp. 305, 309 (N.D. Ohio 1974), in which the alternative ground for dismissal of a challenge to the 180-day delay in the effective date of the indirect source regulations was that the exclusive remedy was a petition for review under section 307(b)(1). Similarly, in *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 367 F.Supp. 1040, 1046 (D. Del. 1973), the court refused, on the same ground, to

entertain an action to challenge a state-granted variance from compliance with a sulfur dioxide emission regulation, which the Administrator had treated as a deferral of compliance amounting to a revision of the state implementation plan and approved as such. See *West Penn Power Co.* v. *Train*, 378 F.Supp. 941, 944-945 (W.D. Pa. 1974); *cf.* Luneburg and Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. Ind. & Com. L. Rev. 667, 691 n. 145 (1974).

Plaintiffs attempt to characterize the regulations' exemption of any facility on which construction was started before January 1, 1975 as a failure to promulgate regulations with respect to such facilities. We think, however, that a provision defining the scope of regulations and their effective date is as much a part of the regulations as the substantive parts.

The explanations contained in the regulations for the exemption clause are "recent firm congressional guidelines contained in amendments to the Clean Air Act," compelling administrative reasons, and the need to minimize disruptive effects on industry. (39 Fed. Reg. at 7272-7273.) A review of the sufficiency of these reasons requires an examination of the administrative record, which is not before us now but would be if this were a petition for review.

The exemption provision is an integral part of the regulations and, like any other part, must be reviewed in a petition for review. It cannot be reviewed by an action filed in the district court.

Plaintiffs have in fact filed a separate petition for review of the indirect source regulations in this court (No. 74-1231), and that petition, together with others filed in various other circuits attacking the indirect source regulations, has been transferred on the EPA's motion to the Court of Appeals for the District of Columbia (No. 74-1595 in that court). Their contentions concerning the validity of the exemption provision will presumably be determined in that litigation.

The Failure to Promulgate Significant Deterioration Regulations for Automobile-Related Pollutants

Regulations for two air pollutants, particulate matter and sulfur dioxide, having been promulgated after the complaint was filed (see note 2, *supra*), plaintiffs now seek to require the Administrator to promulgate regulations for carbon monoxide and the other automobile-related pollutants for which he had established national ambient air standards.

As the District Court pointed out, the Administrator has already been ordered in *Sierra Club* v. *Ruckelshaus, supra,* to promulgate significant deterioration regulations. Counsel for the government, in their brief in this court, represented that the Administrator had complied with this order, and "[t]herefore, since the significant deterioration regulations have already been published, the issue of any prior failure to promulgate them is rendered moot." Because, as is apparent from the regulations and the Administrator's introductory statement accompanying them (39 Fed. Reg. 42,510 (Dec. 5, 1974)), and as counsel for the government acknowledged during oral argument, the regulations that have been promulgated relate to only two of the six identified pollutants, the case is not moot as to this point. Whether there is a need for a second order against the Administrator to do that which he has already been ordered to do in the *Sierra Club* case is a question we need not reach, because we find that this claim is not maintainable by plaintiffs at this time.

Section 304(a) of the Amendments, 42 U.S.C. § 1857h—2(a), provides in pertinent part as follows:

> "Except as provided in subsection (b), any person may commence a civil action on his own behalf—
>
> . . .
>
> "(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator."

Subsection (b), 42 U.S.C. § 1857h—2(b), imposes the following limitation upon this right to sue:

> "No action may be commenced—
>
> . . .
>
> "(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, . . ."[3]

Plaintiffs failed to give the Administrator sixty days notice prior to commencing suit, which the District Court held was fatal to its jurisdiction. The court reasoned that the purpose of the sixty-day notice requirement was to give the Administrator time to assess and respond to difficult, multi-count lawsuits, to deploy attorneys from Washington, if necessary, and to arrange for the on-going process of regulatory development and other substantive EPA concerns despite the interruption caused by a pending lawsuit. The statute's sixty-day notice requirement would be nullified, said the court, if plaintiffs were required to do nothing more than comply with Fed. R. Civ. P. 12(a), which grants the United States, or an officer or employee thereof, sixty days in which to answer a complaint in any civil suit. *City of Highland Park* v. *Train, supra,* 374 F.Supp. at 766-767. In accord with the District Court's holding are *Pinkney* v. *Ohio Environmental Protection Agency, supra,* 375 F.Supp. at 308 and *West Penn Power Co.* v. *Train, supra,* 378 F.Supp. at 944. *Cf. Metropolitan Washington Coalition for Clean Air* v. *District of Columbia,* 373 F.Supp. 1089, 1092 (D.D.C. 1974).[4]

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3. The statute also specifies certain exceptions to this notice requirement that are not applicable here.

4. The *Metropolitan Washington Coalition* case is consistent, in our view, with the holding of *Pinkney* and *West Penn Power Co.* The plaintiffs in *Metropolitan Washington Coalition,* although they failed to give the required sixty-day notice before filing their first complaint, filed a subsequent complaint raising the same issues more than sixty days after the service of the first. This, as the court held, in subtance afforded the Administrator the sixty-day notice to which he was entitled under section 304(b).

Contra, Riverside v. *Ruckelshaus*, 4 E.R.C. 1728 (C.D. Cal. 1972).[5]

The legislative history of section 304 shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clear Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in section 304.[6] Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored.[7]

The language chosen by Congress makes it clear that the Administrator is to be given notice in addition to that required by Rule 12(a), Fed. R. Civ. P., which allows him sixty days to answer or move against a complaint by which an action is commenced. Section 304(b)'s statutory command plainly states that "[n]o action *may be commenced* . . . prior to 60 days after the plaintiff has given notice of such action to the Admin-

5. In response to the Administrator's argument that plaintiffs' failure to comply with the statutory notice requirement of section 304(b)(2) barred jurisdiction under the Clean Air Act, the *Riverside* court found that personal service on the Administrator coupled with a lapse of sixty days between the date of filing the complaint and the date of completion of a hearing on plaintiff's request for a preliminary injunction, amounted to "substantial compliance" with the sixty-day notice requirement and gave the Administrator "the beneficial effect" of the requirement. (4 E.R.C. at 1731.)

6. See S. Rep. No. 1196, 91st Cong., 2d Sess., 36-39 (1970), reproduced at 116 Cong. Rec. 32926-27 (1970); 116 Cong. Rec. 33102-03 (1970); Conf. Rep. No. 91-178, 91st Cong., 2d Sess., U.S. Code Cong. & Admin. News 5374, 5388 (1970).

7. See Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 San Diego L. Rev. 107, 132 (1974), which discusses the beneficial impact that the statutory notice provision of section 304 has in allowing the EPA an opportunity to react to citizen complaints before a suit is filed, in some cases obviating the need for citizen suits.

istrator." (Emphasis supplied.) Plaintiffs made no attempt whatsoever to comply with the notice provision, and their suit therefore could not properly be commenced.

Alternatively, plaintiffs also rely on statutory mandamus,[8] 28 U.S.C. § 1361, which provides that "district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Among the courts and legal scholars there have been repeated efforts to ascertain the precise scope and limitations of section 1361.[9] For purposes of the present case, however, we

8. It should be noted that, in addition to alleging jurisdiction under the Clean Air Act of 1970, 42 U.S.C. § 1857h-2(a)(2), and statutory mandamus, 28 U.S.C. § 1361, plaintiffs allege that jurisdiction over the present case also exists under section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the general federal question jurisdiction statute, 28 U.S.C. § 1331. We need not consider these latter bases for jurisdiction, however, for even assuming that any one were to properly establish jurisdiction, none empower the district court to grant plaintiffs the requested relief of a court order compelling the Administrator to promulgate significant deterioration regulations.

9. Though it is undisputed that Congress intended 28 U.S.C. § 1361 to extend mandamus jurisdiction, formerly exercised only by the District Court for the District of Columbia, to district courts elsewhere, and thereby authorize suits against officials who fail to perform ministerial acts, there is some doubt concerning whether the purview of the common law writ of mandamus was broadened by the inclusion of the words "in the nature of" before the word "mandamus" in section 1361, or whether Congress meant only to make the writ available as it was at common law. Compare *Burnett* v. *Tolson*, 474 F.2d 877, 880 (4th Cir. 1973), *State Highway Commission of Missouri* v. *Volpe*, 479 F.2d 1099, 1104-1105 n. 6 (8th Cir. 1973), and *Peoples* v. *United States Dep't of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970) with K. Davis, *Administrative Law Treatise* § 23.09 (Supp. 1970), and Byse & Fiocca, *Section 1361 on the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 318-320 (1967). For cases adopting the traditional and more prevalent view of section 1361 see *Carter* v. *Seamans*, 411 F.2d 767, 773 n. 11 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970).

need not be concerned with defining the jurisdictional reach of that section. However broad its scope, mandamus cannot be invoked to require the District Court to order the Administrator to promulgate significant deterioration regulations.

The traditional principles generally recognized as controlling the issuance of a writ of mandamus were concisely stated by the court in *Lovallo* v. *Froehlke*, 468 F.2d 340, 343 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973), as follows:

> "(1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available."

See also *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-544 (1937).

There is, as we have seen, another remedy available that provided in section 304(a)(2) of the Clean Air Amendments of 1970, which affords any person a direct remedy to compel the Administrator to perform a non-discretionary duty. We cannot say that remedy which is available upon compliance with the notice provision of section 304(b)(2) is inadequate. Furthermore, if mandamus were held to be available as an alternative to a citizen's suit under section 304(a)(2), Congress would have accomplished nothing whatsoever by providing for the citizen's suit, or by imposing the sixty-day notice requirement of section 304(b)(2). The remedy of mandamus is not designed to circumvent a condition to suit properly imposed by Congress.

It is, accordingly, unnecessary for us to reach the question of whether there exists that "plainly defined" duty (*Lovallo* v. *Froehlke, supra*, 468 F.2d at 343), the performance of which is positively commanded and so plainly prescribed as to be free from doubt (*United States* v. *Walker*, 409 F.2d 477, 481 (9th Cir. 1969)), that is necessary to warrant the issuance of a writ of mandamus. We do note that the mater was doubtful enough to cause the Administrator, whose expertise in interpreting the statute is entitled to weight, to conclude that the duty did not

exist and to cause the Supreme Court in the *Sierra Club* case to divide equally on the question of whether he was right. *But cf. Roberts* v. *United States*, 176 U.S. 221, 231 (1899).

Disposition as to Counts I and II

Since neither judicial review of the indirect source regulations nor mandatory relief to compel the promulgation of significant deterioration regulations for pollutants related to automobiles is available in the proceedings before us, there is no predicate in the allegations of Counts I and II for plaintiffs' demand for an injunction against further construction on the highway expansion and the shopping center until their claims concerning these regulations are finally resolved. We cannot find at this stage a sufficient likelihood that regulations entitling plaintiffs to such injunctive relief will ultimately be promulgated to justify an award of injunctive relief. We therefore affirm the dismissal of Counts I and II.

Count III: Absence of an Environmental Impact Statement

Plaintiffs allege in Count III that portions of the expansion of Lake-Cook Road are to be constructed with federal funds, and that the United States Department of Transportation was therefore required by the National Environmental Policy Act of 1969 ("NEPA," 42 U.S.C. §§ 4321, *et seq.*) to prepare an environmental impact statement concerning the expansion, which has not been prepared. They seek an order requiring the preparation of such a statement and an injunction prohibiting the construction of the improvements on the road by Cook County Department of Highways until the statement is prepared. The motions to dismiss by the defendants under this count were supported and opposed by affidavits and documents, and therefore were treated by the District Court, under the authority of Rule 12(c), Fed. R. Civ. P., as motions for summary judgment. The court granted the motions.

Plaintiffs now question the propriety of deciding the issues under Count III by a summary judgment. They appear not to have raised this question when they submitted matter outside the pleadings in opposition to the motions, and did not suggest in their papers in opposition in the District Court the existence of any other evidence bearing on the issues. They had ample opportunity to present all material pertinent to the motion. The court properly determined that there was no genuine issue as to any material fact.

NEPA requires each federal agency, before taking any "major Federal actions significantly affecting the quality of the human environment," to prepare a "detailed statement" analyzing, among other things, "the environmental impact of the proposed action." (42 U.S.C. § 4332(2)(C).) "Actions" include projects supported in whole or in part by federal funding. (40 C.F.R. § 1500.5(a)(2) (1974).) Plaintiffs contend that federal funding has been requested for a 2.47 mile segment of the Lake-Cook Road, and that therefore the requirements of NEPA are applicable to the entire road expansion project.

The documentary evidence submitted below indicates that the 2.47 mile segment of the road has received "federal-aid secondary system" designation. Designation, however, is merely the first step in the procedure for obtaining federal funds for highway improvement. The Federal-Aid Highway Acts indicate that before federal funding is obtained the project must be programmed by a state agency for federal funding and then approved by both the state highway department and federal authorities. (23 U.S.C. §§ 103(c), (f), 105, and 106.) It is undisputed that this designation was made long before the enactment of NEPA, and there is accordingly no basis for a contention that the road improvement project was segmented to circumvent the Act. See *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 633-636 (E.D. Va. 1973), *aff'd per curiam*, 481 F.2d 1280 (4th Cir. 1973).

Plaintiffs submitted, in opposition to the motion, documents which they contend prove that federal funds have been applied for. They consist of a letter from the County Department of Transportation transmitting a county resolution to have Federal Aid Secondary Route ("FAS") 122 (the approximately .5 mile segment between Pfingston and Waukegan Roads) programmed for federal funding; the resolution itself; the Illinois Department's letter to the County Department approving the resolution; a similar set of letters and a resolution concerning FAS 1013 (the approximately 2 mile segment between Sanders and Pfingston Roads); and a document entitled "Draft/Combined Corridor and Design Environmental Statement/Administrative Action for Federal Aid Secondary Routes 1013 & 122," which is not signed and has "Preliminary 11/16/73" written across it. These documents give no indication of federal involvement up to that point in the approval process. Defendants submitted affidavits showing that there has been no programming by the State of Illinois for federal funding of the Lake-Cook Road improvement project, and that no application for federal funds has been made. Counsel for the Cook County Department of Highways represented at oral argument that these facts were unchanged.

Thus the documents relied on by plaintiffs show nothing more than a possibility that federal funds might be applied for. The affidavits establish that no federal funds have in fact been applied for.

One case sustained a preliminary injunction against construction of a highway project for failure to comply with a federal relocation statute,[10] holding that the project for a part of the federal-aid primary system became a federal-aid highway project

10. Determining that this failure was a sufficient ground for granting preliminary relief, the district court found it unnecessary to reach the question of whether defendants also violated NEPA, which was alleged by plaintiffs. *La Raza Unida* v. *Volpe*, 337 F.Supp. 221, 234 (N.D. Cal. 1971). The Court of Appeals did not refer to NEPA.

for purposes of that statute when it received location approval[11] prior to any application for federal funds. *La Raza Unida* v. *Volpe*, 488 F.2d 599 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). That case was not decided under NEPA, which applies to proposed major federal actions and not to a federal-aid secondary designation that took place along before NEPA was adopted or to possible federal funding that is not proposed at present. And, as the district court in *River* v. *Richmond Metropolitan Authority*, *supra*, stated; "Notwithstanding the fact that *La Raza Unida* declared a highway project to be federal early in the planning process, it most assuredly did not hold that a project could be federal where no federal participation had ever taken place." 359 F.Supp. at 634. Possible future federal funding is all that the plaintiffs in the case at bar have shown.

The Lake-Cook Road improvement appears from the summary judgment papers to be a state project on which no federal action is proposed, and therefore, NEPA's requirement of an environmental impact statement does not apply to the project. *See Citizens for Balanced Environment and Transportation, Inc.* v. *Volpe*, 503 F.2d 601 (2d Cir. 1974); *Civic Improvement Committee* v. *Volpe*, 459 F.2d 957 (4th Cir. 1972); *cf. Bradford Township* v. *Illinois State Toll Highway Authority*, 463 F.2d 537, 540 (7th Cir. 1972), *cert. denied*, 409 U.S. 1047 (1972).

Count IV: The Equal Protection Challenge to the Zoning Ordinance

Plaintiffs allege in amended Count IV that the Village of Northbrook and its trustees have deprived them of the equal protection of the laws as guaranteed by the Fourteenth Amendment and seek a judgment declaring invalid Northbrook's zon-

11. The district court defined location approval as the second stage of a highway project, in which the route is specifically established within a corridor which has previously been defined. (*Id.* at 223-224.) Location approval cannot take place unless the state high-

ing approval of the proposed shopping center complex and an injunction "barring future zoning approval until Northbrook demonstrates that its residents have been subjected to similar environmental assaults." Jurisdiction is purportedly predicated upon 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (declaratory judgment remedy); and 42 U.S.C. § 1983 (deprivation of constitutional or federal statutory rights under color of state law), and its jurisdictional correlative, 28 U.S.C. § 1343.

Plaintiffs allege in substance that, upon information and belief, Northbrook and its trustees have "aggressively protected" its residential areas from intrusion by massive commercial developments such as the proposed shopping center complex; that their action in giving zoning approval to the proposed shopping center complex will cause the eventual subjection of plaintiffs to "vast increase in noise and air pollution as well as aesthetic destruction of the quiet residential character of their community;" and that by exposing plaintiffs to these environmental hazards, while protecting Northbrook residents from intrusion of similar developments, Northbrook has discriminated against them in violation of the Fourteenth Amendment. The amendment to the complaint, in which plaintiffs joined the trustees of the Village of Northbrook as additional defendants, did not specify any relief sought against them. The village and the trustees moved to dismiss Count IV of the complaint for want of jurisdiction as to it under 42 U.S.C. § 1983 and for failure to state a claim for which relief could be granted.

As the District Court correctly held (*City of Highland Park v. Train*, *supra*, 374 F.Supp. at 775), there is no jurisdiction under 42 U.S.C. § 1983 over the claim against the village. *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973). Assuming the existence of jurisdictional amount, we have jurisdic-

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way department requests it and until a corridor public hearing is held on the project. (23 C.F.R. §§ 790.[illegible], 790.[illegible] (1973).) Nothing comparable to these procedures has taken place in the present case.

tion against the village on the claim based upon the Fourteenth Amendment under 28 U.S.C. § 1331. The absence of any specific request for relief against the trustees may have justified dismissal as to them, but in any event the complaint, as amended, states no claim on which relief could be granted against either the trustees or the village.

A zoning ordinance is clothed with every presumption of validity. *City of Ann Arbor, Mich.* v. *Northwest Park Constr. Corp.*, 280 F.2d 212, 223 (6th Cir. 1960). Derived from the states' police power, the legislative authority which grants municipalities the power to adopt and enforce zoning ordinances and regulations is not to be narrowly confined. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 5-8 (1974); *cf. Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954). Unless it is based upon a suspect classification or impinges upon a fundamental right (see *Village of Belle Terre* v. *Boraas, supra*, 416 U.S. at 6, 7), which is not true in the case at bar, zoning legislation may be held unconstitutional only if it is shown to bear no possible relationship to the state's interest in securing the health, safety, morals, or general welfare of the public and is, therefore, manifestly unreasonable and arbitrary. *E.g., Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Gorieb* v. *Fox*, 274 U.S. 603, 610 (1927); *Aquino* v. *Trobiner*, 298 F.2d 674, 677 (D.C. Cir. 1961). Thus the scope of judicial review is limited.

It is well established that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because . . . 'in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1960): see *Village of Belle Terre* v. *Boraas, supra*, 416 U.S. at 8; *Sinclair Refining Co.* v. *City of Chicago*, 178 F.2d 214, 217 (7th Cir. 1950). As the Supreme Court observed in *Village of Euclid* v. *Ambler Realty Co., supra*:

"[L]aws may . . . find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." (272 U.S. at 389.)

Inherent in all zoning legislation are statutory distinctions which give rise to claims of disparity of treatment. Inevitably areas zoned for nonresidential uses will touch areas zoned for residential uses, and the burden of the zoning always falls most heavily on the residents adjacent to the boundary. This is essentially all that plaintiffs have alleged here, except that they have framed their grievance in the rhetoric of equal protection.

Plaintiff residents of Highland Park and Glenbrook Countryside allege no classification other than the distinction between residents in close proximity to the proposed shopping center and residents who live farther away. Such a classification, inherent in all zoning, is not within the purview of the Fourteenth Amendment. *Cf. L'Hote* v. *City of New Orleans*, 177 U.S. 587, 597 (1899). "Some must suffer by the establishment of any territorial boundaries. . . . If these limits hurt the [appellants], other limits would hurt others." (*Id.*) So long as such legislation applies equally to all persons similarly situated in a given locale, there can be no violation of the Equal Protection Clause. *Cf. Caskey Baking Co.* v. *Virginia*, 313 U.S. 117, 121 (1941); *United States* v. *Holmes*, 387 F.2d 781, 785 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968).

Zoning is not rendered unconstitutional by the fact that any direct benefit the plaintiffs may receive from it is less than the possible burdens it may impose upon them. Plaintiffs having failed in Count IV to state a claim upon which relief can be granted, the District Court's dismissal of that count is affirmed.

The Petition for Review

On January 6, 1975, plaintiffs filed in this court a petition for review, No. 75-1006, seeking review of the significant deteriora-

tion regulations promulgated by the Administrator on December 5, 1974. That petition which states as petitioners' sole grievance the Administrator's failure to promulgate significant deterioration regulations with respect to carbon monoxide and other automobile related pollutants was consolidated with No. 74-1271 on the representation by petitioners that the same substantive issues were involved in the two cases, the court viewing the petition for review as an attempt by petitioners to "safeguard their jurisdictional grounds." (Order of Feburary 11, 1975, denying motion to reconsider consolidation.)

No brief has been submitted in support of the petition for review. We therefore do not have the benefit of petitioners' views as to the appropriateness of a petition for review to compel the Administrator to act. We think, however, that the function of a petition for review is to invoke a review for correctness by the Court of Appeals of regulations adopted by the Administrator and not to compel the Administrator to act when he has failed to act. Petitioners, in their petition for review, do not challenge the significant deterioration regulations on particulate matter and sulfur dioxide which the Administrator has promulgated. Their petition rather complains that the Administrator "continues in his failure" to promulgate regulations relating to carbon monoxide and other motor vehicle related pollutants. The appropriate procedure for compelling the Administration to act is that provided in section 304(a), *supra*, which expressly provides for an action in the district court "against the Administrator when there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." Plaintiffs recognized this when they brought their action under section 304(a), but they failed to give statutory notice that would have made their action viable. The petition for review is dismissed.

AFFIRMED in No. 74-1271; Petition for Review DISMISSED in No. 75-1006.

UNITED STATES DISTRICT COURT,
N. D. Illinois, E.D.

March 15, 1974.

SUPPLEMENTAL OPINION MARCH 25, 1974.

THE CITY OF HIGHLAND PARK, ET AL.,
Plaintiffs,

VILLAGE OF DEERFIELD,
Additional-Plaintiff, 1-3-74,

vs.

RUSSELL E. TRAIN, ET AL.,
Defendants.

No. 73 C 3027.

MEMORANDUM OPINION

DECKER, *District Judge.*

In this multi-count action, plaintiffs assert that they have been denied, or are in imminent danger of being denied, various federal Constitutional and statutory rights through the action and inaction of various federal, county and private defendants. In general, the primary impetus for this lawsuit is the alleged violation by federal officials and agencies of their duties under the Clean Air Act, as amended, 42 U.S.C. § 1857 et seq., and the National Environmental Protection Act, 42 U.S.C. § 4321 et seq., by failing to subject a particular highway expansion project and an adjacent shopping center complex to the requirements of those statutes. Plaintiffs seek declaratory and injunctive

relief ordering the governmental defendants to take action to meet their statutory obligations and prohibiting further construction of the road expansion or shopping center in the interim.

Plaintiffs consist of the cities of Highland Park and Deerfield, municipal corporations in the immediate area of the shopping center site; the Tri-Suburban Defense Counsel, a non-profit Illinois corporation, whose membership includes residents of Highland Park, Deerfield and Northbrook interested in protecting the physical and aesthetic environment of those cities; and various residents of Highland Park and Glenbrook Countryside. The individual plaintiffs live immediately north or west of the shopping center construction site.

In December, 1973, a hearing was held on plaintiffs' motion for a preliminary injunction and on defendants' motions to dismiss for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief could be granted. The parties having exhaustively briefed the issues raised at the hearing, the matter is presently before the court for a decision of those motions.

1. Background to the Lawsuit

The facts culminating in this lawsuit, as gathered from the papers on file, are as follows: Lake-Cook Road constitutes the boundary line between Lake and Cook Counties. For most of its length, the road consists of two lanes. Starting in 1967, the Cook County Highway Department began to develop plans to expand the road to a four-lane highway and also to construct a four-land extension where no road presently exists. Although it appears that, at that time, an expanded Lake-Cook Road was deemed to be capable of handling projected traffic increases for the next 20 years or more, plaintiffs claim that these estimates did not foresee, nor take into account, the increment in average daily traffic that would be caused by the construction of a large shopping center complex on the Road.

In January, 1973, the defendant developers[1] submitted a proposed plan for the construction of a large shopping center on Lake-Cook Road between Skokie Highway and Waukegan Road.[2] Because of the location of the proposed site in conjunction with the Tri-State Tollway, which blocks all north-south through street access in the area except for Skokie Highway and Waukegan Road, the only main thoroughfare providing access to the shopping center will be Lake-Cook Road. Consequently, plaintiffs estimate that 90% of the traffic generated by the proposed shopping center will have to use Lake-Cook Road.[3]

Plaintiffs claim that expected traffic growth plus the increase in vehicle trips to be generated by the shopping center[4] will soon overwhelm the Lake-Cook Road expansion and will create especially acute traffic congestion at the intersections of Lake-Cook Road with Skokie Highway and Waukegan Road.

These developments allegedly will subject plaintiffs to a substantial increase in "noise and discomfort in the use of their homes and in the use of the streets in their community." More specifically, plaintiffs forecast that the increase in traffic will raise the concentration of carbon monoxide in the ambient air by more than 66% over existing levels.

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1. The developers consist of Sears, Roebuck and Co., Nieman-Marcus Co., Lord and Taylor Inc., Homart Development Co., Broadway-Hale, Inc., and Northbrook Associates.

2. Plaintiffs claim that the shopping center will occupy 1,000,000 square feet and will contain four department stores, 120 smaller retail shops, banking facilities, and an auto repair center. The parking lot will hold 5,000 cars.

3. This estimate is supported by a traffic impact study of the proposed development.

4. It is estimated that 28,400 vehicle trips per day will be attributable to the shopping center.

II. Counts I and II

These counts comprise the heart of this lawsuit. Here plaintiffs allege that the Administrator of the Environmental Protection Agency ("EPA") has failed to promulgate regulations in conformity with a timeable set forth in the Clean Air Act Amendments of 1970 and proposes to grant projects which begin construction prior to May 15, 1974, exemptions from that statute's regulations, also in violation of the statute.

A. The Clean Air Act Amendments of 1970[5]

The Clean Air Act was enacted, *inter alia*, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 1857(b)(1). The program established to control air pollution divides responsibility for the task between the states and the federal government. The Administrator of the EPA has exclusive responsibility for establishing "national ambient air quality standards,"[6] while the states have primary authority, subject to EPA review, for establishing "implementation plans" to achieve these standards. In spite of the complexity and breadth of this undertaking, the Act established an expedited schedule for EPA promulgation of air quality standards, the submission of state implementation plans, and the development of substitute federal programs to replace deficient state plans.

Thus, within 30 days after the passage of the Act, the Administrator was to publish proposed ambient air quality standards for each pollutant for which "air quality criteria had

5. The Clean Air Act was originally enacted in 1963, 77 Stat. 392, and amended in relatively minor respects three times during the following seven years. Its present form, however, derives almost entirely from the amendments adopted in 1970.

6. These are standards designating the maximum tolerable concentration in the air of substances identifiable as pollutants. See 42 U.S.C. § 1857c—4(a).

been issued." 42 U.S.C. § 1857c—4(a)(1)(A).[7] After a maximum of 90 days for public comment upon these proposals, the Administrator was required to issue final air quality standards. 42 U.S.C. § 1857c—4(a)(1)(B). Both of these deadlines were met by the EPA.

Within nine months, after the promulgation of the national ambient air standards, each state was to submit to the Administrator a plan which provided for the "implementation, maintenance, and enforcement" of these standards. 42 U.S.C. § 1857—5(a)(1). The Administrator was to review the state plans within four months to assure that they satisfied the statutory requirements. 42 U.S.C. § 1857c—5(a)(2). Each plan was to provide for the attainment of the national primary standards "as expeditiously as possible" but in no case later than three years after the date of EPA approval of the plan. 42 U.S.C. § 1857c—5(a)(2)(A)(i). Attainment of national secondary standards was to occur with a "reasonable time" to be specified in the plan. 42 U.S.C. § 1857c—5(a)(2)(A)(ii). Further, each plan was to include "emission limitations, schedules and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." 42 U.S.C. § 1857c—5(a)(2)(B). The Act also sets forth a number of other specific conditions required before the approval of the EPA was to be forthcoming. If the plan or any portion thereof was determined not to satisfy the statutory conditions, the Administrator was required to disapprove the plan or portion. In such a situation, he had six months from the date of submission or two months from the date of disapproval, to promulgate

7. The Administrator was to establish two sets of ambient standards: (1) "primary standards," the "attainment and maintenance of which . . . are requisite to protect the public health," 42 U.S.C. § 1857c—4(b)(1); and (2) "secondary standards" "requisite to protect the public welfare from any known or anticipated adverse effects." 42 U.S.C. § 1857c—4(b)(2).

his own implementation plan, or portion, for the state involved. 42 U.S.C. § 1857c—5(c).

Prior to and during the period in which the state plans were under review by the EPA, the Administrator repeatedly expressed doubts about his authority to require state plans to protect against "significant deterioration" of existing clean air regions[8] and was on record as stating that he would not demand such provisions in state plans. See Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 254 (D.C.D.C.), aff'd per curiam (D.C.Cir. 1972), aff'd by an equally divided court sub nom., Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973). The Sierra Club brought suit in the U.S. District Court for the District of Columbia to enjoin the Administrator from approving any state plans omitting provisions on significant deterioration, claiming that such action would constitute a failure to perform a non-discretionary duty in violation of the Act. See 42 U.S.C. § 1857h—2(a). After examining the stated purpose of the Clean Air Act Amendments of 1970, the legislative history of the Act and its predecessor, and pertinent administrative regulations, see 344 F.Supp. at 255-256, the court held for the plaintiffs, concluding that:

> "[T]he Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that . . . permitting the states to submit plans which allow pollution levels of clean air to rise to the secondary standard level of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid." 344 F.Supp. at 256.

The Illinois plan was duly submitted on January 31, 1972, and partial EPA approval was forthcoming on May 31, 1972, within the four-month period prescribed by the statute. However, Illinois and a number of other states were granted an extension until February 15, 1973, to submit the transportation control

8. "Significant deterioration" is an environmental concept referring to situations where the level of pollution in a given area is lower than the secondary air quality standard but is allowed to degrade to the level of the standard.

portions of their implementation plans. See Natural Resources Defense Council v. E.P.A., 154 U.S.App.D.C. 384, 475 F.2d 968, 970 (1973) (hereinafter referred to as *Natural Resources*).

Suit was immediately instituted in the U.S. Court of Appeals for the District of Columbia Circuit challenging these extensions, *inter alia. Natural Resources, supra.* The court determined that, although the Administrator had "acted in the best of faith in attempting to comply with the difficult responsibilities imposed upon him by Congress," 475 F.2d at 970, he had failed to conform to the strict time requirements of the Clean Air Act in granting the extensions with respect to the transportation control aspects of the state plans. In addition, the court found insufficient evidence in the record with respect to whether the EPA had conducted a state-by-state determination on the efficacy of the state plans to provide for maintenance of the primary and secondary standards beyond May 31, 1975.[9] In order "to remedy these violations of the Act," the court established its own time schedule under which the EPA was to review the state plans as to their maintenance provisions and to disapprove those which he determined did not contain sufficient measures. Pursuant to this re-examination, the state plans of Illinois and all other states were found to be deficient.

However, the states were granted a second opportunity to develop adequate programs. In guidelines to the states to aid them in developing these plans, the Administrator noted that several mechanisms were available to mitigate the impact of community growth on air quality maintenance. For example, maintenance could be guaranteed by then-required provisions to review the construction or modification of a stationary source of air pollution where emissions from that source would result in interference with maintenance. 40 C.F.R. § 51.18. See 39

9. The court also found that the Administrator had violated the Act by granting extensions to mid-1977 for attainment of the national primary ambient air standards without following the statutory procedures. 42 U.S.C. § 1857c—5(e).

F.R. 7270 (February 25, 1974). But the Administrator warned such measures alone would not be adequate to ensure maintenance. Accordingly, he advised that the stationary source review procedures be expanded by the states to cover "complex" or "indirect" sources of air pollution—"facilities [like the shopping center in question here] which do not themselves emit pollutants, but which attract increased motor vehicle activity and thereby may cause violations of an implementation plan's transportation control strategy or may prevent or interfere with the attainment of an ambient air quality standard." 39 F.R. 7270 (February 25, 1974). Notwithstanding these suggestions the states failed to include adequate complex source provisions and the Administrator again was compelled to disapprove the state plans. See 38 F.R. 6290 (March 8, 1973). At the time of the institution of this suit, and pursuant to the time schedule adopted by the court in *Natural Resources*, the EPA was in the process of holding public hearings in 43 states to receive comment on complex source regulations.[10]

B. The Issues in Counts I and II

In Count I, plaintiffs complain of the continuing failure of the Administrator to promulgate federal implementation regulations to correct the deficiencies of the Illinois plan within the time period established by the Act. Since disapproval, rather than approval, should have occurred on May 31, 1972, and since the Act granted the Administrator two months thereafter to issue substitute implementation plans, plaintiffs assert that the Administrator has been in violation of the Act since July 31, 1972. Specifically, plaintiffs emphasize the failure of the Administrator to issue regulations to prevent the significant deterioration of air quality in areas, such as the proposed shopping center location, with air cleaner than national standards or to prevent violations

10. On February 14, 1974, the Administrator issued final regulations concerning indirect sources. See 39 F.R. 7270 (February 25, 1974).

of the standards by complex sources. Plaintiffs seek an order requiring the EPA to promulgate regulations addressed to those problems and halting further construction of the shopping center until the plans therefor have been reviewed by the Administrator under the foregoing regulations.

Count II asserts that the expansion of the Lake-Cook Road, "as impacted by the traffic load" to be generated by the shopping center complex, will cause significant degradation of air quality in the neighborhood and will interfere with the maintenance of air quality standards. Plaintiffs repeat their Count I prayer for a mandatory injunction upon the Administrator to issue the overdue regulations and, further, ask that the road improvement be halted until such time as the regulations are promulgated and the road project is subjected to federal review thereunder.

In response, the defendants have submitted numerous challenges to the jurisdictional bases alleged in the complaint. Each of these will be addressed in turn.

1. Jurisdiction Under the Clean Air Act Amendments of 1970.

Initially, defendants argue that plaintiffs are in the wrong court because the Act provides an exclusive forum in the Courts of Appeals to review allegations of the type made in this complaint. The section of the statute upon which defendants rely provides in relevant part:

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation of approval, or after such date if such petition is based solely on grounds arising after such 30th day." 42 U.S.C. § 1857h-5(b)(1).

Strong arguments are presented by both parties as to the applicability of this provision to the situation at bar. Plaintiffs claim that this is not a suit to review the Administrator's action in "approving or promulgating any implementation plan" because the complaint specifically alleges that the Administrator *disapproved* the Illinois plan under the guidelines of the court in *Natural Resources*, and has not issued a substitute plan. On the other hand, the EPA and the developers argue that the suit falls within the purview of that section. In support thereof, those defendants contend that the origin of this lawsuit can be traced to the Administrator's approval of the Illinois plan on May 31, 1972, and that any regulation enacted will become part of the state plan.[11]

Courts apparently have differed in the interpretation to be given this statutory provision. Compare Utah Int'l, Inc. v. E.P.A., 478 F.2d 126, 127 (10th Cir. 1973); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1305 (10th Cir. 1973), 482 F.2d 1301, 1305 (10th Cir. 1973), with Pinkney v. Ohio Env. Prot. Ag., 375 F.Supp. 305 (N.D.Ohio, 1974). *Pinkney* is the only case on point. In that case, plaintiffs also challenged the action of the Administrator in delaying the effective date of federal regulations with respect to indirect sources. The court deemed this aspect of the suit to constitute a petition for review of administrative action in promulgating regulations and, thus, within the exclusive jurisdiction of the court of appeals.[12]

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11. Defendants claim that plaintiffs also could have sought review of EPA approval of the Illinois transportation control plan on December 5, 1973.

12. In Utah Int'l, Inc. v. E.P.A., *supra*, the court interpreted the clause

> "to provide for judicial review of *final* administrative action. Hence, an order approving a state plan is subject to review, for by approving a state plan, the E.P.A. thereby places the state plan into effect. However, an order disapproving a state plan is not subject to review, because by the mere act of disapproval *no* plan is placed into effect and the administrative process is simply reactivated." 478 F.2d at 127.

To the extent that judicial interpretations of 42 U.S.C. § 1857h—5(b)(1) are irreconcilable, this court need not choose among them, for, even assuming that this action is cognizable in this court, plaintiffs are barred from this forum for failing to observe the Act's procedural requisites for filing suits in district court.

The Act provides for district court jurisdiction of civil suits challenging certain actions of the Administrator. The relevant language provides:

> "[A]ny person may commence a civil action on his own behalf—
>
> * * * * *
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator." 42 U.S.C. § 1857h—2(a).

However, certain limitations are imposed upon this right to sue:

> "No action may be commenced—
>
> * * * * *
>
> (2) under [the foregoing provision] prior to 60 days after the plaintiff has given notice of such action to the Administrator. . . ." 42 U.S.C. § 1857h—2(b).[13]

Plaintiffs acknowledge that this action was instituted without according 60 days notice to the Administrator. However, in an apparent attempt to overcome this omission, plaintiffs have stated that they would not rely upon the citizen suit provision of 42 U.S.C. § 1857h—2 until the expiration of 60 days from the filing of the complaint. This strategy is based upon the decision in Riverside v. Ruckelshaus, 4 E.R.C. 1728 (C.D.Cal. 1972). The court there held that personal service upon the Administrator together with a lapse of 60 days between the

13. The statute granted the Administrator authority to specify the manner in which the notice is to be given. The regulations prescribing the procedures for giving notice are set forth at 36 F.R. 23386-87 (December 9, 1971).

date of filing and the date of completion of a hearing on plaintiffs' request for a preliminary injunction amounted to sufficient constructive compliance with the notice provision so as to give the court jurisdiction under 42 U.S.C. § 1857h—2.

Such an approach to the notice provision constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language and this court respectively declines so to ignore or to modify the notice requirement.

Not only is strict adherence mandated by the statute, it is supported by compelling practical and policy considerations, especially in cases of a complex nature such as the one before the court. Congress was aware of the 60 days granted the United States, or an officer or employee thereof, to answer complaints in civil suits under Rule 12(a), F.R.C.P., when it incorporated the notice provision into the Clean Air Act. Had the drafters of the Act considered the Rule 12 period alone to be sufficient, they would not also have required notice prior to commencement of the suit. During the 60-day period, many questions that might otherwise be presented to the court could be subject to negotiated settlement; this possibility for compromise is at least reduced by forcing the Administrator into court with abbreviated notice. Further, without the grace period, the EPA would be accorded only a few days, as here, where plaintiffs sought an immediate restraining order, to assess, and prepare a response to, a difficult, multi-count suit, seeking substantially more than mere ministerial action. In addition, complex matters might necessitate deploying attorneys from Washington. And, of course, institution of suit interrupts the on-going process of regulation development and other substantive EPA concerns. In light of these considerations, scrupulous observance of the 60-day notice provision must be required. Thus, plaintiffs' failure to meet the notice requirement is fatal to jurisdiction under 42 U.S.C. §1857h—2. Accord: Pinkney v. Ohio Env. Prot. Ag., *supra.*

2. Other Jurisdictional Bases.

The foregoing discussion has precluded the explicit judicial review provisions of the Clean Air Act as bases for jurisdiction in this court. However, an apparent saving clause provides:

> "Nothing in this section [referring to 42 U.S.C. § 1857h-2] shall restrict any right which any person may have under any statute or common law . . . to seek any other relief (including relief against the Administrator or a State agency)." 42 U.S.C. § 1857h-2(e).

In reliance upon that clause, plaintiffs maintain that jurisdiction exists under the following melange of statutes: (1) section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706; (2) the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; (3) the general federal question jurisdictional statute, 28 U.S.C. § 1331; and (4) 28 U.S.C. § 1361.

(a) The Administrative Procedure Act.

A quick reading of section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, would indicate that those provisions constitute a sufficient jurisdictional base for this action. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The Act further provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "The form of proceeding for judicial review" is controlled by "special statutory review proceeding relevant to the subject matter in a court specified" by the particular statute; however, in the "absence or inadequacy" of that review, "any applicable form of legal action" may be brought "in a court of competent jurisdiction." 5 U.S.C. § 703.[14]

14. The APA recites actions for declaratory judgment, injunction, and habeas corpus as examples of forms of legal actions.

The preceding language clearly implies that, where a statute has established a review proceeding adequate to the subject matter, that proceeding is to control. In fact, courts have established a rule that where Congress has provided adequate procedures for judicial review of administrative action, that procedure must be followed. Utah Int'l, Inc. v. E. P. A., *supra* 478 F.2d at 128; Frito-Lay, Inc. v. F. T. C., 380 F.2d 8 (5th Cir. 1967); United States v. Southern Ry. Co., 364 F.2d 86 (5th Cir. 1966), cert. denied, 386 U.S. 1031, 87 S.Ct. 1479, 18 L.Ed.2d 592 (1967). See Pinkney v. Ohio Env. Prot. Ag., *supra*. Otherwise stated,

> "[i]f Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review." Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3d Cir. 1972), cert. denied, 409 U.S. 1125, 93 S.Ct. 937, 35 L.Ed.2d 256 (1973).

See Hegedorn v. Union Carbide Corp., 363 F.Supp. 1061, 1067 (N.D.W.Va. 1973).

As discussed in section *II.B.1., supra,* the Clean Air Act Amendments of 1970 contain their own jurisdictional and judicial review provisions. The Administrator may be brought into district court when he is alleged to have failed to perform a non-discretionary duty, 42 U.S.C. § 1857h—2(a)(2); and, when the Administrator is charged with improperly approving or promulgating a state plan, a petition to review may be filed in the appropriate Court of Appeals. 42 U.S.C. § 1857h—5(b). These provisions would appear to cover the entire gamut of situations where it would be necessary to challenge the Administrator.

In the light of the rigorous manner in which the Courts of Appeals have reviewed the Administrator's actions in promulgating or approving state plans, it cannot be said that those review provisions are inadequate. See, *e. g.*, Natural Resources

Defense Council v. E. P. A., 489 F.2d 390 (5th Cir. 1974). Assuming that this lawsuit is one properly to be presented to a district court, plaintiffs have forfeited their statutory right to be in this forum by neglecting to observe the 60-day notice requirement. See section *II.B.1., supra.* Any "absence or inadequacy" of the citizen suit provision is solely attributable to the plaintiffs and cannot be cured by refuge in the APA. See Pinkney v. Ohio Env. Prot. Ag., *supra.*

Accordingly, section 10 of the APA does not constitute an independent jurisdictional basis for this lawsuit.

(b) The Declaratory Judgment Act.

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, any federal court may declare the rights and legal relationships of parties who have presented an actual case or controversy within the court's jurisdiction. However, it is well-settled that this statute is not jurisdictional; its operation is procedural only. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937). See Skelly Oil Co. v. Phillips Pet. Co., 339 U.S. 667, 671, 70 S.Ct. 876, 879, 94 L.Ed. 1194 (1950). The Declaratory Judgment Act "enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Pet. Co., *supra.*

Thus, unless plaintiffs' action is otherwise within the competence of this court, the Declaratory Judgment Act is of no help in establishing jurisdiction. See Getty Oil Co. v. Ruckelshaus, *supra* 467 F.2d at 356; Zimmerman v. United States Gov't., 422 F.2d 326, 331 n. 7 (3d Cir.), cert. denied, 399 U.S. 911, 90 S.Ct. 2200, 26 L.Ed.2d 565, reh. denied, 400 U.S. 855, 91 S.Ct. 26, 27 L.Ed.2d 93 (1970); Hagedorn v. Union Carbide Corp., *supra* 363 F.Supp. at 1068; Thompson v. Groshens, 342 F.Supp. 516, 520 n. 11 (E.D.Pa.1972); Mattingly v. Elias, 325 F.Supp. 1374, 1375 n. 3 (E.D.Pa.1971), rev'd on other grounds, 482 F.2d 526 (3d Cir. 1973).

(c) Federal Question.

The general federal question statute, 28 U.S.C. § 1331, confers upon district courts original jurisdiction of suits arising under the Constitution, laws, or treaties of the United States. The classic case of Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), set forth the analysis to be employed by the courts in determining whether allegations were sufficient to establish subject matter jurisdiction under that statute:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the . . . laws of the United States, the federal court . . . must entertain the suit. . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief. . . .
>
> "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations . . . do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." Id. at 681-682, 66 S.Ct. at 776.

Plaintiffs' allegations that the Administrator has breached a statutory duty owed to them under the Clean Air Act Amendments (*i. e.*, that he has failed to meet the statutory timetable and failed to promulgate regulations which would prevent significant degradation of air quality and prevent violations of air quality standards by indirect sources) clearly bring the complaint within the purview of the general federal question statute and require an examination of the Clean Air Act to determine

whether the claims are well-founded.[15] See Wheeldin v. Wheeler, 373 U.S. 647, 649, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1964); Powell v. McCormack, 395 U.S. 486, 516, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Gautreaux v. Romney, 448 F.2d 731, 734-735 (7th Cir. 1971).

As previously noted, the court in *Natural Resources,* set up a timetable to remedy both the Administrator's failure to observe the strict time requirements of the Act and to review the state plans for adequate maintenance provisions. For all practical purposes, the statutory timetable has been replaced by that of the court, at least with respect to Illinois and the other states involved. To refer solely to the original statutory time schedule at this late date to determine the Administrator's compliance with his obligations under the Act is meaningless, for once that timetable was disregarded, and the time periods specified therein had elapsed, neither the EPA nor the states could retrieve it.

The timeliness of the Administrator's performance must now be judged against the court's schedule. It should be noted that the time periods allowed the Administrator by the court to accomplish his tasks substantially reflect the comparable periods set forth in the Act. At the time this action was instituted, the Administrator was under a duty to promulgate regulations by December 15, 1973. An extension to February 15, 1974, was subsequently obtained. Thus, as of the date of suit, the Administrator was not in breach of his responsibilities under the court mandate. Moreover, the time schedule created by the court was entirely consistent with, indeed, more stringent than, that originally set up in the statute. Under 42 U.S.C. § 1857c-5(c), the Administrator is accorded six months from "the date required for [state] submission of [a] plan (or revision thereof)" to pro-

15. Although the Court in Bell v. Hood also noted that a suit could be dismissed on jurisdictional grounds where the federal claim is "immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," 327 U.S. at 682-683, 66 S.Ct. at 776, these exceptions to the general rule do not apply here.

mulgate an implementation program for those states whose plans do not meet the statutory criteria. The initial court order required submission of state plans by April 15, 1973; this date was subsequently extended to August 15, 1973. Under 42 U.S.C. § 1857c-5(c), therefore, the EPA had until February 15, 1974, to promulgate implementation plans. Thus, even under the statute, the Administrator was not delinquent, the February date being six months from "the date required for submission of [state] plan[s]."

This conclusion is supported by the decision of the court in Plan for Arcadia, Inc. v. Anita Associates, Civ.No.73-2480-JWC (C.D.Cal., December 12, 1973), a lawsuit, remarkably similar to the instant case. There, individual and corporate plaintiffs, whose environmental interests were similar to those of the plaintiffs here, brought suit to enjoin further construction of a shopping center and to compel the Administrator to formulate an implementation plan for California dealing with complex sources. The court noted that under the "new timetable" established by the court in *Natural Resources*, the time for promulgation of the requested substitute regulations had not yet elapsed. Accordingly, the action was deemed to be premature and was dismissed for failure to state a claim.

That decision is also notable for its disposition of the claims against the developers. First, the court reasoned that, since plaintiffs' only remedy under the Clean Air Act was against parties in violation of regulations promulgated thereunder, 42 U.S.C. § 1857h-2(a), and since regulations had not yet been issued, no cause of action was stated against the corporate developers. Second, plaintiffs maintained that, notwithstanding the absence of regulations controlling complex sources, the Act should be read to forbid construction of any project which would interfere with the attainment and maintenance of the national air quality standards. The court properly rejected this argument, noting that the Act merely provided for the promul-

gation of implementation plans and the establishment of standards of performance.

In light of the foregoing, plaintiffs' complaint, insofar as it is based upon 28 U.S.C. § 1331, must be dismissed for failure to state a claim upon which relief can be granted.

(d) 28 U.S.C. § 1361.

The passage of 28 U.S.C. § 1361 in 1962 enlarged the jurisdiction of the district courts. The courts were granted "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." In light of the assertions in the complaint, and the language of 28 U.S.C. § 1361, that provision must be deemed to establish jurisdiction in this court to review plaintiffs' claims.

However, this statute, and its companion venue provision, 28 U.S.C. § 1391, "were designed [only] to eliminate obstacles to bringing mandamus actions outside of the District of Columbia and were not meant to alter the traditionally limited nature of the [mandamus] writ." Davis v. Shultz, 453 F.2d 497, 502 (3d Cir. 1971). See Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970); Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969). Courts have long viewed mandamus as an extraordinary remedy, to be granted only in the most clear and compelling circumstances. Carter v. Seamans, *supra*. The rigid principles generally recognized as controlling the issuance of the writ were concisely stated by the court in Carter v. Seamans, *supra*, as follows:

> "(1) a clear right in the plaintiff to the relief sought; (2) a clear duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available."

This court has previously determined that the complaint must be dismissed under 28 U.S.C. § 1331 for failure to state a claim under the Clean Air Act for which relief could be granted.

In this situation, plaintiffs do not have a "clear right" to the relief sought and the defendants are under no "clear duty" to perform the act in question. Accordingly, relief will not lie under 28 U.S.C. § 1361.

3. Comity.

Assuming, however, that this court has subject matter jurisdiction and that these counts state a claim for relief, the principle of comity would compel the court to defer to the exercise of jurisdiction by the District of Columbia Circuit in *Natural Resources.*

The Supreme Court long ago explained the comity doctrine in the following terms:

> "The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord. . . ." Covell v. Heyman, 111 U.S. 176, 182, 4 S.Ct. 355, 358, 28 L.Ed. 390 (1884), quoted in Kline v. Burke Const. Co., 260 U.S. 226, 229, 43 S.Ct. 79, 67 L.Ed. 226 (1922).

In situations where lawsuits present identical or substantially overlapping issues, the rule avoids decisional inconsistencies and the imposition of unnecessary burdens upon the courts by allowing the court which first acquired jurisdiction to proceed without interference. See Great Northern Ry. Co. v. National Railroad Adjust. Bd., 422 F.2d 1187, 1193 (7th Cir. 1970).

To allow this suit to go forward would lead to the very situation the doctrine of comity was intended to avert. The timetable established in *Natural Resources* was intended to replace the statutory schedule upon which plaintiffs base this action, and the regulations being developed by the EPA under the supervision of the court will embrace the previously overlooked

"complex source" topics. It is clear, therefore, that the very matters which prompted this lawsuit are being dealt with in another court. There has been no complaint that the timetable in *Natural Resources* is inadequate.[16] Further, when issued, the regulations will have nationwide applicability. Finally, failure to observe the principle of comity here would set an unfortunate precedent by which the EPA could be needlessly subjected to a maze of litigation throughout the country.

Moreover, those considerations which would justify a second court in proceeding are notably absent here. For example, this is not a matter where subsequent Supreme Court review would be aided by "the interim expression of views by more than one circuit." Dellinger v. Mitchell, 143 U.S.App.D.C. 60, 442 F. 2d 782, 787-788 (1971). Nor is there any purpose in seeking a "division of labor in the interest of efficiency in judicial administration." *Id.* at 788.

Indeed, in accepting jurisdiction of the several cases involved in *Natural Resources,* the District of Columbia Circuit noted the futility of requiring the suits to proceed in other jurisdictions:

> "None of these issues involve facts or laws peculiar to any one jurisdiction; rather, all concern uniform determinations of nationwide effect made by the Administrator. Requiring these cases to be prosecuted in several circuits will only lead to delay . . . where time is literally of the essence, and will needlessly tax the agency's legal resources. 475 F.2d at 970.

Accordingly, assuming the error of this court's determination that subject matter jurisdiction is lacking and that the complaint fails to state a claim upon which relief can be granted, this court would be bound by the doctrine of comity to decline to exercise its jurisdiction.

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16. Indeed, as noted previously, that court has generally adopted the Clean Air Act time frame.

III. Count III

Count III is brought against the U.S. Department of Transportation ("DOT"), its Secretary, and the Cook County Department of Highways, for DOT's alleged failure to meet its obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. NEPA requires each federal agency, in carrying out its programs, to use all practicable means to assure safe, healthful, and aesthetically pleasing surroundings, and to attain the widest beneficial uses of the environment without degradation or risk to health or safety. 42 U.S.C. § 4331(b). To ensure that each federal agency gives due consideration to the values sought to be recognized in that statute, the Act imposes a review mechanism upon the agencies. Before a federal agency can take any "major Federal actions significantly affecting the quality of the human environment," it must prepare a "detailed statement" analyzing, *inter alia*, the environmental impact of the proposed undertaking. 42 U.S.C. § 4332(C). The federal activities embraced by this provision are defined to include any project financed in whole or in part by federal funds. 38 F.R. 20550 (August 1, 1973). It is on this basis that plaintiffs allege that an environmental impact statement is required for the Lake-Cook Road expansion project. No impact statement has been prepared. Accordingly, plaintiffs seek an injunction requiring preparation of the statement and barring further construction of the road in the interim.

In light of the affidavits and other material outside the pleadings which have been presented with regard to this count, the defendants' motions to dismiss will be treated as motions for summary judgment. Rule 12(c), F.R.C.P.

The record establishes that no federal funds have been used, approved, or applied for, and that the state has not even "programmed" the project as an undertaking eligible for federal funds allocated to the state.[17] See 23 U.S.C. §§ 103-106. The

17. The possibility that federal funds may be applied for eventually does not of itself, and especially not without any prior federal

only conceivable relevant federal contact with the road improvement has been designation of a two-mile and adjacent ½ mile portion of the highway[18] as parts of the Federal Aid Secondary System in 1941 and 1958, respectively, long before the present expansion plans were considered.[19]

Although, in a particular case, NEPA obligations may arise prior to federal approval or disbursement of funds, see River v. Richmond Metro. Auth., 359 F. Supp. 611 (E.D.Va.1971); La Raza Unida v. Volpe, 337 F.Supp. 221 (N.D.Cal. 1971), no court has deemed NEPA to apply to a project with such *de minimus* federal involvement. See River v. Richmond Metro. Auth., *supra*, 359 F. Supp. at 633-634. Accordingly, summary judgment for defendants will be entered on this count.

IV. Count IV

Amended Count IV, brought against the Village of Northbrook and its Trustees, asserts an imaginative claim that these parties have deprived plaintiffs of the equal protection of the laws as guaranteed by the Fourteenth Amendment. In support of this contention, plaintiffs allege, upon information and belief, that Northbrook has "aggressively protected" the village's residential areas from commercial and industrial developments proposed in neighboring municipalities where such complexes would abut Northbrook's residential areas. Plaintiffs allege further that municipalities are required by the U.S. Constitution to exercise their zoning powers uniformly so as to prevent aesthetic, physical, and economic harm to persons residing within and without corporate limits. The Trustees' action in enacting a zon-

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involvement, render the project federal for purposes of NEPA. See River v. Richmond Metro. Auth., 359 F.Supp. 611, 633-634 (E. D.Va. 1973).

18. This segment lies between one-half to one mile west of the shopping center.

19. This designation makes the road improvement eligible for consideration for federal funds.

ing change to permit construction of the shopping center is claimed to be in "direct contrast" to Northbrook's prior land use policies and to permit the eventual subjection of plaintiffs to "vast increases in noise and air pollution as well as aesthetic destruction of the quiet residential character of their community." By exposing plaintiffs to these environmental hazards, while aggressively protecting Northbrook residents from intrusion of similar developments adjacent to their homes, plaintiffs contend that the Trustees have discriminated against them in violation of the Fourteenth Amendment. Plaintiffs seek a judgment declaring that Northbrook's zoning approval for the shopping center is invalid and an injunction prohibiting "future zoning approval until Northbrook demonstrates that its residents have been subjected to similar environmental assaults." Jurisdiction is asserted under 28 U.S.C. § 1331, § 1343, § 2201, and 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute," deprives another of his civil rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The recent decision of the Supreme Court in City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), holding that municipalities are not "persons" within the meaning of 42 U.S.C. § 1983, necessitates dismissal of the Village of Northbrook as to that jurisdictional base. However, apart from the statute, plaintiffs may maintain an action for equitable relief against the municipality under the Fourteenth Amendment. See, *e.g.*, Bennett v. Gravelle, 323 F.Supp. 203, 216-217 (D. Md.), aff'd, 451 F.2d 1011 (4th Cir. 1971), cert. dismissed, 407 U.S. 917, 92 S.Ct. 2451, 32 L.Ed.2d 692 (1972).[20]

In essence, plaintiffs are challenging Northbrook's land use decision with respect to the tract of property on which

20. Curiously, no prayer for relief is requested specifically as to these officials.

the shopping center is to be built. Although that decision may be in marked contrast to the Village's prior policy with respect to similar developments in abutting surrounding communities, that fact does not make out an equal protection claim. Municipalities must retain the authority to modify their policies with respect to community development, without having the burden of demonstrating that the consequences of change fall evenly upon interested parties. A contrary rule would prevent local government from reacting to changed conditions or from implementing alterations in municipal priorities. The unreasonableness of such a rule is apparent on its face.

Moreover, it appears that the plaintiffs are in no different a position than those Northbrook residents whose homes are also adjacent or are in close proximity to the proposed shopping center. By allowing the development to proceed, neither the Trustees nor the Village has "classified" groups of residents. Northbrook residents gain no special benefits over plaintiffs or any other adjacent landowners; nor will the latter suffer any special injury unlike that to be borne by Northbrook residents. To the extent that the shopping center complex will alter the character of the neighborhood or subject it to increased noise, light, and air pollution, that detriment will operate equally upon those within the area.

Accordingly, Count IV must be dismissed.

V. Conclusion

In view of the foregoing discussion of the various counts of plaintiffs' complaint, it is clear that the entire cause must be, and hereby is, dismissed.

SUPPLEMENTAL OPINION

This matter having come before the court on plaintiffs' motion under Rule 62(c), F.R.C.P., for an injunction pending appeal of this court's opinion and order of March 15, 1974, and the court having heard the parties in open court and denied said motion, this memorandum is intended to set forth the reasons for such denial.

It is well-established that the following four factors must be considered in determining whether this extraordinary remedy should be granted: (1) whether petitioner has made a showing of a strong likelihood of success on the merits of the appeal, (2) whether petitioner will suffer irreparable injury without this relief, (3) whether issuance of a stay would cause substantial harm to other interested parties, and (4) whether the public interest supports the injunction. Virginia Petroleum Jobbers Ass'n v. F.P.C., 104 U.S.App.D.C. 106, 259 F.2d 921 (1958).

For the reasons enumerated in this court's March 15th opinion, and for the additional reasons set forth below, the court does not consider plaintiffs to have a strong probability of success on the merits, either on jurisdictional or substantive grounds.

Secondly, plaintiffs have not demonstrated that any injury emanating from denial of the injunction would be irreparable. The harm is entirely *in futuro* and even plaintiffs' expert's affidavit in support of the motion for a temporary restraining order evidenced that the expected increase in the carbon monoxide level concomitant to the shopping center would not necessarily exceed the air quality standard for that pollutant.

Thirdly, an injunction would seriously disrupt long-standing construction plans for the shopping center and road expansion. Construction is proceeding. Since no statutory duty is being violated, plaintiffs' theory for granting emergency relief, under which defendants' equities are ignored, is inapplicable.

Fourthly, in light of the foregoing, it cannot reasonably be concluded that the public interest demands the issuance of the injunction. The court is reluctant to interrupt on-going administrative procedures; certainly, it is in the interest of Illinois residents to have the EPA give full, yet expeditious, consideration to all relevant factors prior to issuance of the regulations.

Finally, plaintiffs maintain that this court erred in assuming that the order in Natural Resources Defense Council v. E.P.A., 154 U.S.App.D.C. 384, 475 F.2d 968 (1973), embraced significant degradation regulations. A review of that order shows that the state and substitute federal plans were to satisfy each requirement of 42 U.S.C. § 1857c-5(a)(2), and, thus, were to include any "measures . . . necessary to insure attainment and maintenance" of air quality standards. Since it had earlier been determined that non-degradation regulations were essential under the Clean Air Act, Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.C.D.C.), aff'd per curiam (4 E.R.C. 1815) (D.C.Cir. 1972), aff'd by an equally divided court sub nom., Fri v. Sierra Club, 412 U.S. 541, 93 S.Ct. 2770, 37 L.Ed.2d 140 (1973) this court naturally concluded that significant deterioration provisions could be included within the regulations issued under the order in *Natural Resources*.

Moreover, it has not been conclusively determined that the Clean Air Act requires prevention of significant deterioration of air quality as a decision affirmed by an equally divided Supreme court is not an authoritative determination for other cases. United States v. Pink, 315 U.S. 203, 217, 62 S.Ct. 552, 86 L.Ed. 796 (1942). A reading of 42 U.S.C. § 1857c-5(a)(2)(B) strongly indicates that protections against significant deterioration need be included only "as may be necessary" in the expert judgment of the E.P.A., a determination subject to review in the Courts of Appeals.

In sum, therefore, this court determined that neither the law nor the facts were so clearly in plaintiffs' favor as to warrant issuance of an injunction pending appeal.